No. 96-1866-CFX Title: Alida Star Gebser and Alida Jean McCullough, Petitioners
v.
Lago Vista Independent School District

Docketed:
May 23, 1997 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	May 23 1997	Petition for writ of certiorari filed. (Response due November 5, 1997)
	Jun 23 1997	Waiver of right of respondent Lago Vista Independent School District to respond filed.
	Jun 25 1997	DISTRIBUTED. September 29, 1997
	Sep 16 1997	Response requested. (Due October 16, 1997)
	Oct 3 1997	Order extending time to file response to petition until November 5, 1997.
	Nov 5 1997	Brief of respondent Lago Vista Independent School District in opposition filed.
	Nov 19 1997	REDISTRIBUTED. December 5, 1997
	Dec 5 1997	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 16, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 13, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 13, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 25, 1998. **********
	Dec 19 1997	Record filed.
	Dec 30 1997	Record filed.
	Jan 16 1998	Joint appendix filed.
	Jan 16 1998	Brief of petitioner Alida Star Gebser and Alida Jean McCullough filed.
	Jan 16 1998	Brief amicus curiae of National Education Association filed.
	Jan 16 1998	Brief amici curiae of National Women's Law Center, et al. filed.
	Jan 16 1998	Brief amicus curiae of United States filed.
	Jan 16 1998	LODGING consisting of ten sets two documents,entitled Lodging I and Lodging II received from the Solicitor General
	Feb 13 1998	Brief of respondent Lago Vista Independent School District filed.
	Feb 13 1998	Brief amicus curiae of TASB Legal Assistance Fund filed.
	Feb 13 1998	Brief amicus curiae of Kentucky School Boards Association filed.
	Feb 13 1998	Brief amici curiae of National School Boards Association, et al. filed.
	Feb 13 1998	Brief amicus curiae of American Insurance Association filed.
	Feb 23 1998	CIRCULATED.
	Feb 25 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

2pp

No. 96-1866-CFX

Entry	Date	Proceedings and Orders
	Mar 9 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 12 1998	Reply brief of petitioner Alida Star Gebser and Alida Jean McCullough filed.
	Mar 25 1998	ARGUED.

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JEAN DOE AND JANE DOE, a minor,
Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

What is the proper standard of liability of a school district under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.*, for a teacher's sexual harassment of a pupil?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

Miscellaneous

Petitioners Jane Doe and Jean Doe, a minor, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above proceedings on February 24, 1997.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Western District of Texas is reprinted in Appendix A, *infra*. The opinion of the court of appeals is reported at 106 F.3d 1223 (5th Cir. 1997) and is reprinted in Appendix B, *infra*. The judgment of the court of appeals is reprinted in Appendix C, *infra*.

JURISDICTION

The court of appeals entered its judgment on February 24, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance... .

STATEMENT OF THE CASE

Jane Doe was a minor when this action was filed, but has since become an adult. Jean Doe, who sued as next friend, is her mother. Respondent Lago Vista Independent School District is a public school district which, at all times pertinent to this dispute, received federal financial assistance. Collier Deposition, Page 23, Lines 13--20, R. 372. Jane Doe was a pupil in that District.

Jane Doe was thirteen years of age when she first encountered Frank Waldrop, who was the husband of Jane Doe's teacher in middle school. Gebser Deposition, Page 22, Lines 10--25. R. 346. Waldrop, a retired U. S. Marines Colonel, R. 143, was employed as a high school teacher by Respondent.

While in middle school, Jane Doe was in a gifted and talented program taught by Frank Waldrop's wife but her precocity caused Mr. and Mrs. Waldrop to arrange to have her attend a great books discussion group at the high school level, led by Mr. Waldrop. Gebser Deposition, Page 23, Lines 4--23, R. 346. The next year this contact between Jane Doe and Waldrop became a formal student-teacher relationship, and Waldrop began singling her out for special attention, because, she thought, of her intellectual qualities. Gebser Deposition, page 42, Lines 2--19, R. 349.

This attention rapidly became personal, and Waldrop steadily escalated his approaches from merely verbal to overtly physical and sexual by the spring of 1992, during Jane Doe's freshman year. Gebser Deposition, Page 42, Line 2--Page 51, Line 5, R. 350--51. Later in the spring of 1992, Waldrop had sexual intercourse with her. Gebser Deposition, Page 62, Lines 12--19, R. 353. Jane Doe attended summer classes taught by Waldrop, who took

advantage of his access to her by having sexual intercourse with her frequently throughout the summer of 1992. Gebser Deposition, Page 62, Line 20--Page 63, Line 24, R. 353. This continued into the following school year, until January, 1993.

Jane Doe testified that her principal motivation in allowing and continuing the sexual relationship was to continue having Waldrop as her teacher. Gebser Deposition, Page 66, Lines 3--10, R. 353. Waldrop was, before the revelation of this relationship, considered to be a good teacher (Collier Deposition, p. 16, l. 24; p. 17, l. 17), and given the wide range of power a teacher has over a student it is unsurprising that Jane Doe was both flattered and flustered by his attention. Moreover, she testified, she did not know anyone to whom she could report his transgressions. Gebser Deposition, Page 68, Lines 5--15, R. 354.

Virginia Collier was Respondent's superintendent during this period. Collier Deposition, Page 4, Lines 19--22, R. 369. She acted as the coordinator of Title IX and had responsibilities relating to the prevention of gender discrimination. Collier Deposition, Page 22, Line 16--Page 23, Line 12, R. 372. Until the revelation of Waldrop's misconduct, Ms. Collier was only casually acquainted with Jane Doe. Collier Deposition, Page 8, Line 15--Page 10, Line 19, R. 369--70.

Ms. Collier stated that no specific person was appointed by the district to receive complaints of inappropriate sexual conduct or harassment, and that instead the principals of each school would have been the persons to receive such complaints. Collier Deposition, Page 28, Line 18--Page 29, Line 13, R. 373. She was unaware of any specific information delivered to students informing them of

this fact, however. Collier Deposition, Page 29, Line 4--Page 30, Line 18, R. 373. Similarly, she could not recall any district-wide meetings or counselling services to the faculty for the purpose of dealing with teacher-student sexuality except for an address by the district's lawyer which occurred after Waldrop's relationship with Jane Doe had been discovered. Collier Deposition, Page 26, Line 5--Page 27, Line 20, R. 373.

Mrs. Collier testified that all teachers are allowed a wide latitude in their contacts with students, including time in which a teacher would be alone with a student, and that teachers were allowed the use of school facilities to meet with students after regular school hours and during the summer months. Any district supervision of the teachers would, she said, be "sporadic." Collier Deposition, Page 52, Line 11--Page 53, Line 7, R. 377. While this is probably an inescapable fact of life in public school districts, it is one fraught with dangers. A teacher has unrestricted power over the student: He can give or withhold favorable attention in the classroom; he can grant high or low grades on the basis of a subjective evaluation; his grades, letters of recommendation and other assistance, play a large part in the students' eligibility for college admission and financial assistance.

While there is no direct evidence that any school official was aware of Waldrop's sexual exploitation of Jane Doe, the parents and guardian of two other students did complain to district officials of inappropriately suggestive remarks Waldrop made to and in the presence of their daughter and their female ward. Tully Deposition, Page 18, Line 5--Page 19, Line 19, R. 496. This complaint was made by Anna Tully to Michael Riggs, the principal of the high school. He accepted Waldrop's denial of the incidents and of any bad intention (Riggs Deposition, Page 28, Line 11--

Page 29, Line 13, R. 393), without reporting the complaint to the superintendent Collier. She agreed that the incident should have been reported to her. Collier Deposition, Page 79, Line 11--Page 80, Line 5, R. 382.

The procedural background of this Petition is as follows. Originally Jane and Jean Doe filed their action in state court, naming Respondent and Frank Waldrop as defendants. Against Waldrop they alleged causes of action based on negligent and intentional torts. Against the school district they alleged violations of Jane Doe's rights under 42 U.S.C. §1983 and under Title IX, Educational Amendments of 1972, 20 U.S.C. §1681, *et seq.* Subsequently, on Respondent's motion, the case was removed to federal district court.

After extensive discovery and shortly before this suit was to be called for trial, the United States District Court for the Western District of Texas denied the plaintiff's Motion for a Partial Summary Judgment and granted the school district's Motion for Summary Judgment. The memorandum opinion of the district court is set out at Appendix A. Plaintiffs then non-suited their claim against Frank Waldrop, and the district court then entered its final judgment, which was appealed to the Court of Appeals for the Fifth Circuit. A three-judge panel unanimously affirmed the lower court's judgment, and issued an opinion which is set out at Appendix B.

REASONS FOR GRANTING THE WRIT

The right of students to be free of sexual discrimination, harassment and exploitation by teachers and other employees and officials of public school districts is, as a result of the plethora of opinions from federal district courts and courts of appeals, uncertain. The standards under

which a school district should be held liable for the intentional discriminatory conduct of its agents and employees are unclear. An opinion by this Court, squarely addressing that issue, will clarify the rights of victims of sexual abuse and will serve to enlighten public school officials regarding their duty to supervise their agents and employees, and by so doing will help to reduce the incidence of such abuse.

I.

This Court held, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028 (1992), that a private cause of action exists under the broad mandate of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a), prohibiting sexual discrimination by educational institutions receiving Federal financial assistance. Three decisions recently announced by the Court of Appeals for the Fifth Circuit, for all practical intents and purposes, nullify the right recognized in *Franklin* and essentially immunize public school districts from liability for the misdeeds of its teachers.

In *Leija v. Canutillo Independent School District*, 101 F.3d 393 (5th Cir. 1996), the Fifth Circuit rejected the district court's holding that a school district should be held strictly liable for a teacher's sexual abuse of his student. By implication that opinion even rejected the notion that the district should be liable on the basis of actual knowledge of the abuse, when the knowledge is possessed only by another classroom teacher, on the ground that the teacher "did not have the requisite authority" to justify imputing her knowledge to the district. In *Rosa H. v. San Elizario I.S.D*, 106 F.3d 648 (5th Cir. 1996), the Fifth Circuit rejected the argument that a district could be held liable on the basis of its constructive knowledge of the wrongdoing. And in the

opinion made the basis of this Petition, *Doe v. Lago Vista Independent School District*, *supra*, the Fifth Circuit rejected the contention that a school district could be held liable for its teachers' misdeeds on the basis of common law agency principles.

Thus, in the Fifth Circuit, a student's cause of action under Title IX, as declared in *Franklin*, is limited to those situations in which the sexual perpetrator is an elected official of the school district, or a managerial or executive official such as a superintendent or, perhaps, a principal, and to those situations in which a comparable individual actually knows that the sexual abuse is occurring and then consciously fails to take any action to stop it. While such egregious conduct must occasionally occur, *see, e.g., Doe v. Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994) (*en banc*), the vast majority of instances of sexual abuse is subtler and more covert. If this circumscription of the right of action recognized in *Franklin* is what this Court intended, then this Court should clarify its intention.

A careful reading of *Franklin*, and a consideration of its procedural underpinnings, suggests that the Fifth Circuit has wholly ignored this Court's clear intention to create a private cause of action for legal damages by wronged students against the public school districts when the districts' employees use their inherent authority over the students and engage in sexual abuse and exploitation. First, by recognizing a right of action arising under Title IX, the Court necessarily contemplated that the action would be against the *school district*s, not against the individual wrongdoers. It is the districts, after all, which are "receiving Federal financial assistance," and it is the receipt of that assistance that triggers the liability. Second, sexual abuse and exploitation are by their nature intentional actions perpetrated by individuals, not institutions. If a district

receiving Federal financial assistance is liable for such abuse and exploitation, there must be some form of imputation of liability.

The precise extent and basis of that imputation of liability is not directly addressed by the *Franklin* opinion, but its nature is revealed somewhat by a consideration of the procedural background of the case. Franklin, a minor female, sued the school district and a teacher, alleging that the teacher had persuaded her to engage in a sexual relationship; she based her claim against the school district on 42 U.S.C.§1983, and on Title IX. The district court granted the school district's motion for summary judgment as to both theories, and the court of appeals affirmed. This Court affirmed the court of appeals with respect to the action based on 42 U.S.C. §1983, but reversed with respect to Title IX.

While there is scant discussion in the Court's opinion regarding the 42 U.S.C. §1983 claim asserted by Franklin, it seems clear that the basis of the Court's ruling was the *Monell* doctrine. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018 (1978). As elaborated by this Court's quite recent decision in *Board of the County Commissioners of Bryan County v. Brown*, 1997 WL 201995 (U.S. April 28, 1997), that doctrine rejects the imposition of liability on municipalities based simply on the respondeat superior doctrine, or on any variant of the law of agency, in the absence of evidence of a municipal policy or custom that caused the violation of the civil right.[1]

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[1] This doctrine is based on the precise statutory language of 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Court's rejection of Franklin's §1983 claim, while recognizing the validity of her claim based on Title IX, powerfully suggests that the Court has considered the question of the standard of a school district's liability for its employees' and agents' wrongdoing, and that it has determined that the Title IX standard is different from and lower than the §1983 standard.

The opinion in *Franklin*, however, is no more than suggestive regarding the principles by which liability for a teacher's intentional wrongdoing is imputed to the school district in implementing the student's cause of action under Title IX. That suggestion appears in the following passage, in which the Court rejects the school district's argument that it should not be held liable for its own unintentional violations of Title IX when the only basis of liability was a teacher's intentional but unknown acts, because the district would have no notice that it may be potentially liable for such violations. The Court held:

> This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on [the district] the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed. 2d 49

(1986). We believe the same rule should apply when a teacher sexually

> harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.
>
> 112 S.Ct. 1028, at 1037 (1992)

The facts supporting Jane Doe's Title IX claim are virtually identical to the facts recited in *Franklin*. While it is true that the plaintiff in *Franklin* alleged actual knowledge of the teacher's transgressions, the Court nowhere refers to this allegation as a crucial element in its holding. Indeed, in the passage quoted above, the Court emphasizes that from the district's standpoint the discriminatory conduct was both unintentional and unknown. It is this aspect of the Supreme Court's opinion in *Franklin* that the Fifth Circuit has ignored; instead of following this holding, the Fifth Circuit has created an ill-defined standard that would require actual knowledge at some unspecified but high level of the school district's political hierarchy, perhaps limited to actual elected officials; *see Leija v. Canutillo I.S.D.*, *supra*. It is almost inconceivable that any plaintiff will be able to meet that burden, with the result that the right recognized in *Franklin* is one in name only.

By invoking *Meritor*, the Court clearly indicated that cases arising under Title IX should be resolved using the principles applicable to 28 U.S.C. Title VII. Courts elsewhere, in obedience to the Supreme Court's indication in *Franklin* of the proper standard of school district liability, have utilized principles derived from Title VII cases, and those cases demonstrate that those principles are both workable and fair to all the parties. *See, e.g., Bruneau v. South Kortright Central School District*, 935 F. Supp. 162

(N.D. N.Y. 1996); *Burrow v. Postville Comm. Sch. Dist.*, 929 F.Supp. 1193 (N.D. Ia. 1996); *Pallet v. Palma*, 914 F. Supp. 1018 (S.D. N.Y. 1996); *Pinkney v. Robinson*, 913 F. Supp. 25 (D. D.C. 1996); *Ward v. Johns Hopkins University*, 861 F. Supp. 367 (D. Md. 1994); *Saville v. Houston County Healthcare Authority*, 852 F. Supp. 1512 (M.D. Ala. 1994); *Hastings v. Hancock*, 842 F. Supp. 1315 (D. Kan. 1993); *Doe v. Petaluma City School District*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsideration granted*, 949 F. Supp. 1415 (N.D. Cal.) 1996); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288 (N.D. Cal. 1993). The Sixth Circuit has categorically declared that Title IX cases are most appropriately decided according to the standards that have evolved in consideration of Title VII, holding:

> Both Title IX's legislative history and the regulations enacted pursuant to it amply support this approach. The House Report on Title IX states that 'Title VII ... specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.
>
> *Doe v. Claiborne County Board of Education*, 103 F.3d 495, 514 (6th Cir. 1996)

While *Doe v. Claiborne* is an employment discrimination case, there is no substantive basis for concluding that the standard of liability arising under Title IX should be different for sexual abuse cases arising under Title IX.

Hastings v. Hancock, 824 F.Supp. 1315 (D. Kan. 1993), is an instance in which this Court's directive in *Franklin* was followed. In that case, the plaintiff was a

student at a school of cosmetology operated by Hancock pursuant to a license issued to the Morrisons. The plaintiff sought successfully to hold Morrison liable because Hancock had, in violation of Title IX, created a hostile environment. The court noted *Franklin*'s reliance on *Meritor* and on the RESTATEMENT (SECOND) OF AGENCY, and specifically relied on §219 of that work:

> (2) A master is not liable for the torts of his servants acting outside the scope of their employment unless:
> ***
> (d) the servant purported to speak or act on behalf of the principal and there was reliance upon the apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relationship*.
>
> RESTATEMENT (SECOND) OF AGENCY, §219
> (*emphasis added*)

The testimony presented as summary judgment evidence fully establishes that Waldrop had complete authority over Jane Doe, and that this power was invested in him by the district. To her, he personified the school district, and she was unaware of the school district's loose and ineffective effort to supply her with avenues for complaints about improper conduct. Waldrop had the power to withhold or grant his favors as a teacher, the power to withhold or grant good grades and to govern every aspect of his students' conduct. He was privileged to meet with students privately in the school facilities and during the summer months. All these powers aided him in accomplishing his purpose.

II.

Not only did the Fifth Circuit ignore this Court's holding in *Franklin*, it has also ignored the regulatory system implementing Title IX. While such regulations are not controlling on the courts by reason of their authority, as this Court has observed, they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Meritor Savings Bank, FSB v. Vinson*, *supra*. Implementation of Title IX is the responsibility of the Department of Education's Office for Civil Rights ("OCR"). As early as 1975, the OCR promulgated regulations requiring school districts to disseminate to their students a policy against sexual discrimination and to establish a detailed notification and complaint-resolution procedure. As the testimony of Superintendent Collier reveals in this case, the Respondent at best paid only lip service to these requirements, so that there was no effective way for Jane Doe to seek aid when her teacher initiated his seduction of her, much less afterwards when his efforts resulted in a sexual relationship.

Adult sexual predation on minors is almost always covert, involving escalating pressures calculated to create a feeling of complicity on the part of the minor. Such was the case with Waldrop's seduction of Jane Doe. An adequate statement of policy against sexual contact and discrimination between faculty and students helps the student to recognize inappropriate behavior by a teacher; an adequate structure for notification and complaint affords the student an avenue for help and legitimizes the student when her complaint is just. Such aid was unavailable to Jane Doe, in violation of applicable regulations. Yet the Fifth Circuit's holdings, in this and the other Title IX cases it recently announced, in effect bar her claim because the district was ignorant of its teacher's misconduct. This is not only harsh and unjust

toward Jane Doe, the innocent victim of sexual predation. Worse, it encourages school districts to continue to pay mere lip service to the regulations and to turn a blind eye toward complaints, just as the Respondent did to the Tully complaints described above.

The OCR's most recent body of regulations implementing Title IX specifically impose on school districts a standard of liability based on Title VII, thus amplifying the argument urged in the previous section. "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties," 62 Fed. Reg. 12,034 (1997), states:

> [I]n the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent, or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile environment, even if the school was not aware of the harassment and thus failed to remedy it.

CONCLUSION

It hardly needs to be said that sexual abuse or exploitation of a minor by an adult is a wrong that should, if possible, be redressed by the courts. This Court in *Franklin* went a great distance in doing just that in the public school context. While the award of civil damages to the victims of such abuse and exploitation will only partly redress that wrong, it would serve the same purpose as awards of damages in any other case involving personal injury. Money damages may not cure the psychological harm which foreseeably results from abuse and exploitation, but they will at least enable the victim to seek such remedies as are

available, and they will at least legitimize the victim and erase the stigma that her falsely inculcated feelings of complicity entail. Of equal importance, the threat of money damages will encourage those with the power to minimize such wrongs to do so. The Fifth Circuit placed undue emphasis on its perception of the injustice of holding an innocent and unknowing school district liable for the intentional misdeeds of its employees. Its decisions, virtually immunizing school districts from liability, will only enable wrongdoers to persist in their actions. If this Court's opinion and the regulations of the Department of Education were implemented, rather than ignored, sexual abuse would surely not disappear. But the instances of it would undoubtedly be fewer. That is a goal worthy of attaining, and to achieve that goal Petitioners respectfully pray that this Court grant their Petition, reverse the court below, announce clear standards of liability for the school district, and remand this case for trial on the merits.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JEAN DOE, AS GUARDIAN	§	
AND NEXT FRIEND OF JANE DOE	§	
	§	
VS.	§	**NO. A 95**
	§	**CA 126 SS**
FRANK NEWTON WALDROP and	§	
LAGO VISTA INDEPENDENT	§	
SCHOOL DISTRICT	§	

ORDER

Before the Court are Plaintiff's Motion for Partial Summary Judgment and Defendant Lago Vista Independent School District's Motion for Summary Judgment. Plaintiff has asserted causes of action for negligence, violation of her civil rights[1], and violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* against the Lago Vista Independent School District (LVISD). Plaintiff seeks summary judgment as to the Title IX cause of action.

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[1] Although the Court finds no reference in the amended complaint to a section 1983 claim against Lago Vista Independent School District, the parties address the cause of action in their motions.

LVISD seeks summary judgment on all causes of action asserted against it.

This case arises out of out of improper sexual contact between Jane Doe and Frank Newton Waldrop. At the time of the alleged sexual abuse, Waldrop was a high school teacher in the LVISD and Doe was a student at Lago Vista High School. The school district has not presented an evidentiary challenge to whether the sexual contact/abuse occurred.

Negligence

Plaintiff asserts a negligence cause of action against LVISD for failure to properly supervise Waldrop. Under Texas law, however, a school district may be liable in tort only for activities arising out of the use of a motor vehicle. TEX. CIV. PRAC. & REM. CODE § 101.051; *see also*, *Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978). The negligence cause of action asserted by Plaintiff does not arise out of the use of a motor vehicle. Plaintiff has conceded that she cannot maintain her negligence cause of action against LVISD.

42 U.S.C. § 1983

Plaintiff contends that LVISD violated her substantive due process rights by demonstrating deliberate indifference toward her constitutional rights. In order to establish a cause of action on this claim, Plaintiff must demonstrate:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student;
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.

Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir.), *cert. denied*, 115 S.Ct. 70 (1994).

Plaintiff maintains that summary judgment on her section 1983 claim is not proper because Michael Riggs, principal of Lago Vista High School, failed to take appropriate action in response to a complaint made by Anna Tully, a parent of two students at the high school. In October 1992, Ms. Tully complained to Riggs about inappropriate and offensive *statements* made by Waldrop to the students. The undisputed evidence is that Riggs had a meeting with both the Mr. and Mrs. Tully and Waldrop to address the complaints about the statements. Ms. Tully did not inform Riggs of any further concerns about Waldrop's conduct prior to the arrest of Waldrop in January 1993. Plaintiff asserts that LVISD's failure to take further action in conjunction with the complaint establishes deliberate indifference.

The summary judgment evidence before the Court does not establish a genuine issue of material fact as to either of the first two elements of the section 1983 cause of action. The allegations that statements made by Riggs were sexually

oriented and offensive to students does not "point[] plainly toward the conclusion" that Waldrop was sexually abusing a student or would do so in the future. Construing Tully's allegations in the light most favorable to Plaintiff, the Court finds no evidence in this record that would plainly direct Riggs to the conclusion that Waldrop's behavior was anything more than inappropriate comments in a classroom situation.

Additionally, the Court finds as a matter of law that the actions taken by the Riggs in response to the complaint obviate any finding of deliberate indifference.[2] Riggs held a conference at which the complaints were discussed with Waldrop. After the conference he directed Waldrop to be more careful and sensitive about his remarks to the students. Finally, and importantly, he received no indication that Waldrop did not heed the warning about his behavior. In short, Riggs took action on Mrs. Tully's complaints that, at the time, appeared to have been effective. There is no evidence to suggest that Riggs' response to the complaint was not a good faith effort to solve the problem.

Finally, even assuming the actions of Riggs were deliberately indifferent, *Taylor I.S.D.* does not extend the liability of a governmental unit to include responsibility for constitutional violations by school principals. The decision merely sets forth under what conditions a supervisory school official may be held *individually* liable for a subordinate's violations of a student's constitutional rights. *Id.* at 453-454. Plaintiff may not rely on her allegations of

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[2] The opinion of the expert retained by Plaintiff is not relevant to whether or not Riggs displayed deliberate indifference. Even if Riggs' response was ineffective, the question of deliberate indifference turns on the good faith of his response. *Id.* at 456 n.12.

deliberate indifference by Principal Riggs to establish an official policy or custom of LVISD. *See Gonzalez v. Yselta Indep. Sch. Dist.*, 996 F.2d 745, 752 (5th Cir. 1993) ("Texas law provides that the Board of Trustees is responsible for determining school policy.")

For these multiple reasons, Plaintiff's section 1983 cause of action against LVISD cannot survive summary judgment.

Title IX

Both Doe and LVISD move for summary judgment on Plaintiff's Title IX cause of action. Both parties recognize that a private cause of action exists under Title IX for discrimination when a teacher has improper sexual contact with a student. *See Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028, 1032 (1992). The pivotal issue of disagreement is the standard for imposing liability on a school district for the intentional acts of one of its teachers. Plaintiff contends school districts are held strictly liable for the discrimination by their teachers in violation of Title IX. LVISD argues that a school district must have some knowledge or reason to know of the discrimination before liability may be imposed for a Title IX violation.

Unfortunately, the Supreme Court did not address this issue in *Franklin*.[3] Within the Fifth Circuit, the standard for liability in sexual abuse cases has been addressed by two courts in this district, but with divergent results. In *Leija*,

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[3] In *Franklin*, Plaintiff had alleged teachers and administrators knew of the sexual harassment of Franklin, but failed to take action to stop the harassment. *Id.* at 1031.

Judge Ferguson held that school districts are strictly liable for limited damages for the discrimination by a teacher in cases involving sexual abuse of students by the teacher. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947, 953-55 (W.D. Tex. June 9, 1995),*interlocutory appeal docketed*, No. 95-00195 (5th Cir. Oct. 30, 1995). Addressing similar facts, Judge Briones held that a plaintiff must show that the school district had actual or constructive notice of the sexual abuse or discrimination, the school district failed to take "prompt, effective, remedial measures," and the school district's conduct was negligent. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 887 F.Supp. 140, 143 (W.D.Tex June 12, 1995).

Title IX prohibits intentional discrimination on the basis of gender in connection with educational programs receiving federal funds. *See Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993). By enacting Title IX, Congress sought (1) "to avoid the use of federal resources to support discriminatory practices" and (2) "to provide the individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 99 S.Ct. 1946, 1961 (1979). Title IX was enacted to counter *policies* of discrimination, whether formal or informal, in federally funded education programs. *Id.* at 1961 n.36 (quoting Representative Mink on the purpose of Title IX.). The purpose of Title IX is not furthered by the imposition of strict liability on school districts when a teacher sexually abuses a student unbeknownst to those in a position to stop the abuse.[4]

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[4] Unlike the Court in *Leija*, this Court does not find support in either the statute or the Supreme Court's decision in *Franklin* for imposing strict liability on school districts for sexual abuse committed by a teacher. *Leija*, 887 F.Supp. at 953-55.

Having rejected the strict liability standard[5] this Court believes that in order to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of the discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff.[6] Only once notice is established may the response of the school district to the discrimination be evaluated as far as liability in monetary damages is concerned. A school district, of course, must act is good faith on notice of sexual discrimination, resolve the problem, and prevent further discrimination in violation of Title IX.

Only if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district.[7] To hold a governmental unit liable based on the individual action of a teacher (obviously such conduct would be outside the scope of employment) would be to hold the school district strictly liable for the criminal

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[5] Other courts addressing imputation of liability under Title IX have also rejected the strict liability approach. *See, e.g., Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-50 (2d Cir. 1995); *Floyd v. Waiters*, 831 F.Supp. 867 (M.D. Ga. 1993); *Howard v. Bd. of Educ. of Sycamore Community Unit Sch.Dist. No. 427*, 876 F.Supp. 959, 974 (N.D. Ill. 1995); *Slaughter v. Waubonsee Community College*, 1995 WL 579296 (N.D. Ill. Sept. 29, 1995).

[6] Examples of notice of circumstances suggesting potential discrimination might include persistent rumors about a teacher's sexual involvement with a student or a teacher's resignation from previous employment under suspicion of sexual misconduct.

[7] This standard is less rigorous than that applied to establishing policies in the section 1983 context. *See, e.g., Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 753-55 (5th Cir. 1993).

conduct of one of its teachers. By attempting to prohibit intentional discrimination on the basis of gender, Congress sought to alter the policies of schools receiving federal funds. Congress did not expressly impose civil liability upon school districts for unanticipated actions taken by teachers outside the scope of their employment responsibilities and neither will this Court.

The Court finds further support for this standard in *Franklin's* reference to *Meritor Savings Bank FSB v. Vinson*, 106 S.Ct. 2399 (1986), a Title VII case.[8] In *Vinson*, the Supreme Court held that an employer is not automatically liable for sexual harassment by a supervisor, but the Court declined to provide a precise standard for liability. *Vinson*, 106 S.Ct. at 2408. Addressing the issue of employer liability under Title VII, the Fifth Circuit has determined:

> While *Harris [v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993)] proclaims that sexually hostile or abusive work environments are no longer tolerated under Title VII, that fact does not transform Title VII into a strict liability statute for employers. An employer is liable only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that conduct and eliminate the hostile environment."

Nash v. Electrospace System, Inc., 9 F.3d 401, 404 (5th Cir. 1993) (citing *Jones v. Flagship International*, 793 F.2d 714, 720 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 952 (1987)). The Court believes similar reasoning applies to school district liability under Title IX. The prohibition of

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[8] The Supreme Court cited the *Vinson* for the holding that sexual abuse of a student constitutes discrimination on the basis of gender. *See Franklin*, 112 S.Ct. at 1037.

discrimination on the basis of gender does not reach so far as to impose strict liability on school districts for actions taken by teachers. Under Title IX, a school district must have actual or constructive notice of the discrimination before it may be held liable for the actions of the teacher.

In the case at bar, the only complaint received by LVISD about Waldrop was the Tully complaint about offensive remarks made during class. Principal Riggs promptly addressed this issue with Waldrop. The Court finds as a matter of law, the Tully complaint was not sufficient to establish a genuine issue of material fact as to LVISD's actual or constructive notice of Waldrop's sexually discriminatory conduct alleged by Plaintiff in this case. There is no other evidence in the record to place LVISD on notice that Waldrop had or would sexually abuse female students in the manner alleged by Plaintiff. LVISD had no knowledge of the abuse action alleged prior to Waldrop's arrest in January 1993. Consequently, LVISD may not be held liable for Waldrop's actions in violation of Title IX.

Conclusion

Plaintiff concedes she cannot maintain her negligence cause of action against LVISD. The Court has determined as a matter of law that LVISD did not exhibit deliberate indifference to Jane Doe's constitutional rights and that the school district was without the notice of the discrimination required to pursue a claim against it under Title IX. Therefore, summary judgment is appropriate as to all causes of action asserted by Plaintiff against the Lago Vista Independent School District. The causes of action asserted against Defendant Frank Waldrop are not affected by this disposition.

Accordingly, the Court enters the following orders:

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment, filed November 3, 1995, is DENIED; and

IT IS ORDERED that Defendant Lago Vista Independent School District's Motion for Summary Judgment [#37] is GRANTED as to all causes of action asserted against Lago Vista Independent School District by Plaintiff.

SIGNED on this 28th day of November 1995.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX B

U.S. COURT OF APPEALS
F I L E D
FEB 24 1997
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50056

JEAN DOE, as Guardian and Next Friend of Jane Doe; JANE DOE,
Plaintiffs-Appellants,

versus

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before KING and HIGGINBOTHAM, Circuit Judges, and LAKE,* District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

* District Judge of the Southern District of Texas, sitting by designation.

This case presents the question of when a school district is liable under Title IX for a teacher's sexual harassment of a student. We recently addressed this question in a pair of Title IX cases, *Rosa H. v. San Elizario Indep. School Dist.*, __ F.3d __, No. 95-50811 (5th Cir. 1997), and *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996). Based on those cases, we affirm summary judgment in favor of the school district.

I.

Frank Waldrop, a teacher at Lago Vista High School, first met Jane Doe while she was a student in his wife's eighth-grade honors class during the 1990-91 school year. At that time, she was thirteen. Because Doe needed a more challenging academic program, Waldrop's wife referred her to her husband's high school discussion group, which Doe participated in for several weeks. When Doe became a ninth-grader, she was assigned to Waldrop's class in advanced social studies. Their relationship grew during the academic year. Waldrop went out of his way to flatter Doe and spend time alone with her, and Doe enjoyed receiving attention from her instructor.

Waldrop initiated sexual contact with her at her home in the spring of 1992. Knowing she would be alone, he visited under the pretext of returning a book and proceeded to fondle her breasts and unzip her pants. During the summer, Waldrop had sex on a regular basis with Doe, who was by then fifteen years old. None of the encounters took place on school property. The relationship ended in January of 1993, when a Lago Vista police officer happened to discover Waldrop and Doe having sex.

Doe agrees with the school district that "there was no direct evidence that any school official was aware of

Waldrop's sexual exploitation of Jane Doe" until January of 1993. The parents and guardian of two other students complained to Michael Riggs, the high school principal, that Waldrop had made inappropriate remarks in the presence of female students. Riggs organized an investigation into this complaint, Waldrop denied the charges, and Riggs did not bring the matter to the attention of Virginia Collier, the district superintendent.

The plaintiff sued the school district for negligence and for violations of § 1983 and Title IX. The plaintiff concedes that her negligence action cannot succeed under Texas law. Judge Sparks granted summary judgment to the school district on both statutory claims. Doe appeals only the summary judgment on her Title IX claim.

II.

Doe's Title IX cause of action has its origin in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). But while *Franklin* made it possible for private litigants to use Title IX to recover money damages when teachers sexually abuse students, it did not set out the standard for assessing a school district's liability. The school district insists that Doe cannot recover unless we are willing to hold educational institutions strictly liable for teacher's misconduct. Doe, on the other hand, claims that summary judgment was inappropriate because school districts can be liable on agency principles when a teacher uses his position of authority to abuse students sexually.

We have recently rejected the notion that Title IX creates strict liability in teacher-student sexual harassment cases. In *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), we reversed a district court's denial of summary judgment where a teacher molested a second-grade

student during movies on school grounds and another teacher had notice of the harassment. A school district is not absolutely liable because, "[s]imply put, strict liability is not part of the Title IX contract." 101 F.3d at 399. To recover, Doe must be able to articulate a theory that is less expansive than strict liability.

One possibility is a theory based on constructive notice. Under this theory, Title IX plaintiffs, like Title VII plaintiffs, can prevail by showing that management-level authorities should have known of the misconduct and failed to take steps to end it. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989). In *Leija*, we held that the teacher's abusive conduct was not so pervasive that a reasonable juror could find constructive notice, in spite of the fact that a student and her mother reported the abuse to a teacher. *Leija*, 101 F.3d at 402. Doe does not pursue the constructive-notice theory because, as in *Leija*, there is not enough evidence for a jury to conclude that a Lago Vista school official should have known about the abuse. Doe did not present any evidence that any Lago Vista employee other than Waldrop knew of the relationship. School officials knew of complaints about Waldrop's tendency to make inappropriate remarks to students, but those complaints did not concern Doe and gave officials no reason to think that Waldrop would have sex with a student.

Instead of strict liability or constructive notice, Doe's theory of recovery relies on the common-law rule that an employer is vicariously liable for the tort of an employee, even if that tort was outside of the scope of employment, if the employee "was aided in accomplishing the tort by the existence of the agency relationship." *Restatement (Second) of Agency* § 219(2)(d) (1958). According to Doe, Waldrop's status as a Lago Vista instructor made his abuse possible: he used his authoritative position to take advantage of an

adolescent student who wanted to please her teachers and fit in socially. The court in *Hastings v. Hancock*, 842 F.Supp. 1315, 1319-20 (D. Kan. 1993), used this theory to deny summary judgment to a plaintiff who sued the owners of a hairstyling school under Title IX for the harassing conduct of the operator of the school. The court noted, however, that it was dealing with an unusual case because the owners had given the harasser complete authority to run the school as he wished. It acknowledged that "it would be too broad a reading of section 219(2) (d) for a court to hold that an employee was aided in accomplishing the tort in that he would not have been there but for his job." *Id.* (citing *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 579 (10th Cir. 1990)).

We rejected this agency theory in *Rosa H. v. San Elizario Indep. School Dist.*, __ F.3d __, __, No. 95-50811 (5th Cir. 1997). Under *Rosa H.*, school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so. Although that case went to a jury on a negligence theory drawn from § 219(2)(b) rather than § 219 (2) (d), we noted that a common-law agency theory would permit courts to use § 219(2) (d) and that that section would generate vicarious liability in virtually every case of teacher-student harassment. *Rosa H.*, __ F.3d at __. We follow *Rosa H.* and refuse to allow plaintiffs to use Title IX, which was enacted under the Spending Clause, to bring tort suits based on the mere fact that a teacher's employment status aided in the commission of sexual harassment.

III.

Because Doe cannot maintain a private cause of action under Title IX based on strict liability, constructive notice, or the common law of agency, we AFFIRM the district court's summary judgment in favor of Lago Vista Independent School District.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50056

D. C. Docket No. A-95-CV-126

JEAN DOE, as Guardian and Next Friend
of Jane Doe; JANE DOE
Plaintiffs - Appellants

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT
Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin.
Texas, Austin.

Before KING and HIGGINBOTHAM, Circuit Judges and LAKE,* District Judge.

* District Judge of the Southern District of Texas, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: APR 09 1997

OP-OA-J-1

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit
By /s/
Deputy
New Orleans, Louisiana
APR 09 1997

(2)

No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

JEAN DOE and JANE DOE, a Minor,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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26pp

QUESTION PRESENTED

Whether a public school district can be held liable under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, for hostile environment sexual abuse of a student by a teacher when the school district had neither actual nor constructive knowledge of that abuse.

LIST OF PARTIES

Plaintiffs/Petitioners:

Jean Doe, As Guardian and Next Friend of Jane Doe, A Minor (legal names are in the record)

Defendant/Respondent:

Lago Vista Independent School District

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Respondent Lago Vista Independent School District respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 106 F.3d 1223 (5th Cir. 1997).

STATEMENT OF THE CASE

A. Statement of Facts

Jane Doe was a student in the Lago Vista Independent School District (Lago Vista) in Travis County, Texas. (R. 346.) She was an intelligent student and, while still attending middle school, she participated in a high school level "great books" discussion group conducted by teacher Frank Waldrop. (R. 346.) No inappropriate behavior occurred at that time. (R. 346.) The following year, when Doe entered the high school as a freshman, Waldrop was again her teacher. (R. 347.) Over the course of the first semester, he engaged her in private conversations and singled her out for special attention. (R. 349-50.) In the spring of that year (1992) he began having sexual intercourse with her. (R. 352-53.) This relationship continued until Waldrop was arrested in January 1993.

None of the sexual activity alleged by Doe occurred on Lago Vista's property. (R. 353.) Doe did not inform any teacher or administrator of Waldrop's inappropriate behavior, nor was the relationship commonly known among the students or staff at Lago Vista. (R. 352-53.) Indeed, Doe participated in concealing her relationship with Waldrop because she knew that if she reported it, the relationship would be terminated immediately. (R. 353-54.)

The school district received only one prior complaint about Frank Waldrop that is relevant to this case. The parents of two of Waldrop's students complained to the principal about remarks

Waldrop had made in class. (R. 392.) Those remarks included the observation that some of the girls had "filled out" over the summer and an obscure reference to the size of some of the boys' belt buckles. (R. 392.) The principal, Michael Riggs, promptly investigated the complaint and set up a meeting between Waldrop and the parents. (R. 392.) He also admonished Waldrop to be more careful about his comments in the future. (R. 393.) Riggs did not receive any further complaints.

During at least a portion of the period in which Waldrop was engaging in sexual conduct with Doe, Lago Vista had in place written policies prohibiting any employee from sexually harassing a student. (R. 414-15, 417.) "Sexual harassment" was defined as including:

> such activities as engaging in sexually oriented conversations, telephoning students at home or elsewhere to solicit unwelcome social relationships, physical contact that would reasonably be construed as sexual in nature, and threatening or enticing students to engage in sexual behavior in exchange for grades or other school-related benefit.

(R. 417.)

The district also had a written complaint policy which provided that

> [a] student or parent who has a complaint alleging sexual harassment or offensive intimidating conduct of a sexual nature may request a conference with the principal or designee.

(R. 420.) The principal or designee was then required to hold a conference within five days and to coordinate an investigation

which was to be completed within ten days. (R. 420.) This procedure was not followed in the present case because neither Doe nor her parents made any complaint about Waldrop's conduct.[1] (R. 380.)

B. Proceedings Below

The United States District Court for the Western District of Texas rejected Doe's contention that Lago Vista should be held strictly liable for Waldrop's conduct because such a holding would not further Title IX's purpose of countering *policies* of discrimination in federally funded education programs. (R. 544-45.) The court concluded instead that:

> to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff.

(R. 545.) Because there is no evidence in the present case that Lago Vista had actual or constructive notice of Waldrop's sexually discriminatory behavior, the court granted Lago Vista's motion for summary judgment on Doe's Title IX claim.[2] (R. 547.)

The United States Court of Appeals for the Fifth Circuit

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1. Doe's parents did not condone Waldrop's conduct, they were simply unaware of it because Doe concealed the relationship from them as well as from school officials. (R. 382).

2. The district court also granted summary judgment on Doe's claims for negligence and violation of § 1983, but Doe appealed only from the ruling denying her Title IX claim.

affirmed the order of the district court in accordance with its recent opinions in *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648 (5th Cir. 1997), and *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2434, 138 L. Ed. 2d 195 (1997). The court reiterated its position that Title IX does not impose strict liability on a school district for sexual harassment of a student by a teacher. *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997). It also rejected a theory of common-law agency, noting that such a theory "would generate vicarious liability in virtually every case of teacher-student harassment." *Id.* at 1226. The court concluded, as it had in *Rosa H.*, that:

> school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Id. There is no evidence in this case that any employee of Lago Vista with supervisory power over Waldrop had actual knowledge of his abuse of Doe.

REASONS FOR DENYING THE WRIT

This Court should deny Doe's petition for writ of certiorari because: (1) a recent guidance issued by the Office for Civil Rights may resolve the conflict among the courts of appeals; (2) Doe's assertion of inconsistent theories of liability at various phases of this lawsuit has impeded thorough deliberation of the question in the courts below; (3) Doe misconstrues this Court's opinion in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the case on which she primarily relies; and (4) the facts of this case will abridge the Court's consideration of the full range of possible standards of liability.

I.

A RECENT SEXUAL HARASSMENT GUIDANCE ISSUED BY THE DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS MAY RESOLVE THE CURRENT CONFLICT AMONG THE COURTS OF APPEALS.

A. This Court declines to address issues that are likely to be resolved by the action of another appropriate entity.

A petition for writ of certiorari should be granted only if "special and important reasons" exist for doing so. *See Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 73-75 (1955). It is not sufficient that a case present an interesting problem because "this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* at 74. When it becomes apparent that action taken by another entity, such as a legislature or regulatory agency, may resolve the conflict presented in a petition for writ of certiorari, this Court should decline to grant the petition. *See Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (Court declined to address sentencing guideline issue because Sentencing Commission "has already undertaken a proceeding that will eliminate circuit conflict").

This Court has not hesitated to dismiss a writ, even at an advanced stage of the proceedings, if it determines that "the case is not appropriate for adjudication." *Rice*, 349 U.S. at 79. For example, the issue in *Rice* involved the constitutional ramifications of a contract prohibiting the burial of a non-Caucasian in an Iowa cemetery. On motion for rehearing, after the judgment of the lower court had been affirmed because this Court was evenly divided, it was brought to the attention of the Court that the Iowa legislature had passed a statute preventing

such discrimination in the future. 349 U.S. at 73. The Court noted,

> in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute.

Id. at 77. It then dismissed the writ of certiorari as improvidently granted. *Id.* at 79-80.

The case at bar is one in which time may well "further illumine or completely outmode" the issue in dispute. For the reasons stated below, this Court should deny Doe's petition for writ of certiorari before further judicial resources are unnecessarily expended.

B. A recent OCR guidance will likely resolve the issue presented in this case.

Lago Vista agrees with Doe that the appropriate standard for measuring a school district's liability under Title IX for sexual abuse of a student by a teacher is currently unsettled. The courts of appeals and the district courts have employed a variety of standards, including strict liability, *see Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Missouri 1996); an intentional discrimination standard borrowed from Title VI, *see Nelson v. Almont Community Schools*, 931 F. Supp. 1345 (E.D. Michigan 1996); a "knew or should have known" standard borrowed from Title VII, *see Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) and *Kinman v. Omaha Public School Dist.*, 94 F.3d 463 (8th Cir. 1996); imputed liability under section 219(2)(b) of the Restatement (Second) of Agency, *see Seneway v. Canon McMillan School Dist.*, 969 F. Supp. 325 (W.D. Pa. 1997); imputed liability under section 219(2)(d) of the

Restatement (Second) of Agency, *see Kracunas v. Iona College*, 1997 WL 376912 (2d Cir. 1997); and the "actual knowledge" standard used by the Fifth Circuit in this case, *see Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223 (5th Cir. 1997).

In response to confusion in the schools due, in part, to the varied standards of liability being applied by the courts, the Department of Education's Office for Civil Rights (OCR) issued a final policy guidance on March 13, 1997. This guidance specifically addresses a school district's liability for sexual harassment of a student by a teacher or other employee:

> [A] school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue. Under agency principles, if a teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee "stands in the shoes" of the school and the school will be responsible for the use of its authority by the employee or agent.
>
> A school will also be liable for hostile environment sexual harassment by its employees, i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment if the employee — (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of

students by his or her position of authority with the institution.

Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039-40 (1997) (footnotes omitted). A school district is also liable under the guidance if it fails to take immediate and appropriate steps to remedy known harassment. *Id.*

Courts accord great deference to interpretations by the Office for Civil Rights when construing Title IX. *See Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1014 n.20 (5th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 165, 136 L. Ed. 2d 108 (1996) (citing *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993)); *see also Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (guidelines interpreting statute by enforcing agency "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

The Fifth Circuit in *Rosa H.* expressly acknowledged that the OCR was preparing a guidance on sexual harassment that conflicted with its holding in that case, but which was not yet in final form. *Rosa H.*, 106 F.3d at 658. It noted that because of the contractual nature of Spending Clause legislation such as Title IX, the guidance could not be given retroactive effect. *Id.* But it also acknowledged the possibility that the standard of liability it would apply in future cases might change to comport with the OCR guidance once it was finalized: "We make no comment on how these guidelines might affect cases in which a school district accepts Title IX funds after the guidelines' promulgation date." *Id.*

The courts have not yet had sufficient opportunity to determine the effect the OCR guidance will have on their prior holdings regarding a school district's liability under Title IX. Because the guidance addresses that issue in detail, and because

of the deference traditionally accorded the OCR's interpretation of Title IX, it may well be expected that promulgation of the guidance will resolve the inconsistencies that currently exist in the various circuits. In any event, it is appropriate that the courts of appeals be given an opportunity to apply the OCR guidance to resolve the conflicts between them before this Court intervenes.

At the time of the sexual abuse here at issue, at the time the district court granted summary judgment, and at the time the Fifth Circuit issued its opinion in this case, the OCR guidance had not yet been finalized. That guidance has no application in this case, but will likely be instrumental in the courts' construction of Title IX in future cases. Thus, even if this Court were to conclude in the present case that the Fifth Circuit erred in rejecting strict liability, that conclusion would amount to mere error correction, which does not justify the use of the Court's precious and finite resources. *See Rice*, 349 U.S. at 74 (Court does not sit for benefit of particular litigants).

It remains to be seen whether issuance of the OCR guidance resolves the conflict among the circuits. If it does, then intervention by this Court will not be necessary. If it does not, then this Court can address the issue in a more appropriate case — one in which discussion of the standard of liability has been developed in the context of the law in its present state, which includes the OCR guidance and its effect.

II.

DOE HAS ASSERTED INCONSISTENT THEORIES OF LIABILITY.

Even if the Court determines that the time is right to address what standard of liability applies to a school district in cases of teacher-student sexual abuse, this is not the right case. While

Doe's petition for writ of certiorari does not explicitly state the standard of liability she proposes for holding a school district liable under Title IX for sexual abuse of a student by a teacher, it appears that she is advocating the standard contained in section 219 of the Restatement (Second) of Agency — that a master is liable for the tort of his servant acting outside the scope of his employment if the servant was aided in accomplishing the tort by the existence of the agency relationship. This, however, is not the standard initially proposed by Doe.

Doe alleged in her live pleading that Lago Vista was *strictly liable* under Title IX for Waldrop's wrongful conduct. (R. 316.) In her motion for partial summary judgment, Doe explicitly rejected agency principles as supplying the standard of liability under Title IX: "A remedy requiring proof of agency or apparent agency is no remedy at all." (R. 335.) The district court specifically noted, "Plaintiff contends school districts are held strictly liable for the discrimination by their teachers in violation of Title IX." (R. 543.) The court rejected this theory and adopted a standard of liability requiring proof of actual or constructive knowledge of the discrimination or notice of circumstances indicating a strong potential for the type of discrimination alleged. (R. 545.) It did not discuss agency principles.

In framing the issue before the Fifth Circuit, Doe asked whether actual or constructive knowledge by school district officials is required by this Court's opinion in *Franklin v. Gwinnett County Indep. School Dist.*, 503 U.S. 60 (1992). Rather than pursuing her argument that the school district is strictly liable, she asserted that it was liable because of the high degree of authority it granted to teachers over students, which authority aided Waldrop in engaging in his illicit relationship with Doe. In short, Doe asserted that Lago Vista's liability rests on the principles stated in section 219(2)(d) of the Restatement (Second) of Agency.

The Fifth Circuit rejected strict liability as the Title IX standard of liability and noted that Doe was not pursuing a theory of liability based on constructive notice. *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d at 1225. It then addressed (and rejected) Doe's agency theory, although that theory was not presented to the district court either in Doe's motion for partial summary judgment or in her response to Lago Vista's motion for summary judgment.

Lago Vista does not assert that Doe has waived or is estopped from raising the agency theory of liability. Rather, it points out the inconsistency in Doe's theories to alert the Court to the fact that the agency theory was not fully developed beginning at the district court level, and also to demonstrate that Doe has not exhibited strong commitment to the theories she has proposed.

It cannot be disputed that the standard for holding a school district liable under Title IX for the sexual abuse of a student by a teacher is of sufficient importance to require the attention of this Court (assuming that the issue does not resolve itself under the new OCR guidance). Nevertheless, the inconsistent positions taken by Doe in the proceedings below deprived the lower courts of the opportunity to analyze fully the contentions now at issue before this Court.

III.

DOE MISCONSTRUES THIS COURT'S OPINION IN *FRANKLIN v. GWINNETT COUNTY PUBLIC SCHOOLS*, 503 U.S. 60 (1992).

The present case is also not appropriate for review by this Court because Doe misinterprets and misapplies the case upon which she primarily relies.

A. The issue in *Franklin* was the availability of a monetary remedy.

Doe contends that this Court held in *Franklin* that a private cause of action exists under Title IX for sexual discrimination by educational institutions receiving federal financial assistance. (Petition for Writ of Certiorari at 6.) Lago Vista disagrees with this assessment of *Franklin. A* private cause of action under Title IX was first recognized by this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The Court in *Franklin* expressly stated that it was not revisiting that question. 503 U.S. at 65. Rather, the issue in *Franklin* was whether the implied cause of action that the Court had already recognized in *Cannon* supported a claim for monetary damages. *Id.* at 62-63. The Court twice emphasized that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Id.* at 65-66, 69. Because *Franklin* addressed only the *remedy* available under Title IX, it provides no support for Doe's agency theory of liability.

Doe places great emphasis on the following language from the Court's opinion in *Franklin:*

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Id. at 75. By use of this language, the Court did not recognize a new cause of action but simply acknowledged that sexual abuse of a student by a teacher can constitute sexual discrimination

under Title IX, for which it had already recognized a cause of action. The context of the Court's statement was its discussion of whether the limitation on remedies for unintentional violations of statutes enacted pursuant to the Spending Clause should be extended to intentional violations of such statutes. Because the Court was not addressing the appropriate standard of liability for school districts, the above-quoted language cannot be read to foreclose a requirement of actual or constructive knowledge.

B. *Franklin* did not involve a claim under section 1983.

Doe also asserts that this Court's "rejection" of a section 1983 claim in *Franklin* "powerfully suggests" that the standard of liability under Title IX is lower than the standard under section 1983. (Petition for Writ of Certiorari at 8-9.) Lago Vista has been unable to find any reference that this Court considered, much less rejected, a section 1983 cause of action in *Franklin.* Indeed, the Eleventh Circuit's opinion in that case specifically noted that the court was not considering "the question of any legal rights which Franklin may or may not have under either: (1) state law; or (2) any federal statute other than Titles VI or IX." *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 622 n.10 (11th Cir. 1990). Thus, Doe's analogy to section 1983 is without support.

C. *Franklin* is factually distinguishable.

The crucial difference between the facts in *Franklin* and the facts in the present case concern notice: the school district in *Franklin* had actual knowledge of the abuse and failed to take remedial action, *see* 503 U.S. at 63, but Lago Vista had no knowledge of Waldrop's abuse of Doe and no opportunity to remedy the situation. Doe attempts to minimize this distinction by stating that "the Court nowhere refers to this allegation as a crucial element in its holding." (Petition for Writ of Certiorari

at 10.) But certainly the existence of actual knowledge was significant to the Court's declaration that the case involved *intentional* discrimination. 503 U.S. at 74-75. Further, contrary to Doe's assertions, the Court did not emphasize that "from the district's standpoint the discriminatory conduct was both unintentional and unknown." (Petition for Writ of Certiorari at 10.) The Court explicitly recognized that the district *did* know of the abuse. 503 U.S. at 63.

IV.

THE FACTS OF THIS CASE WILL LIMIT THE COURT'S CONSIDERATION OF THE FULL RANGE OF POSSIBLE STANDARDS OF LIABILITY.

As noted above, the appropriate standard for measuring a school district's liability under Title IX for sexual abuse of a student by a teacher is unsettled. The courts have applied theories ranging from strict liability, *see Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Missouri 1996), to requiring actual knowledge by a person in authority, *see Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223 (5th Cir. 1997). This case would give the Court occasion to address only one end of that spectrum — the end least likely to resolve the current debate among the federal courts. Doe necessarily seeks to impose a strict liability standard because it is undisputed that Lago Vista had neither actual nor constructive knowledge of the abuse. Unless it adopts a strict liability standard, this Court could determine, at most, that *some* knowledge is required. It could not determine whether actual knowledge is required or whether constructive knowledge is sufficient, nor could it determine who in the school district must possess such knowledge. The standard of liability would remain undefined. Lago Vista respectfully suggests that a more appropriate case in which to address the standard of liability for a school district is one in which someone in the district

possesses some form of knowledge of the abuse. Only then can the questions of "who must have knowledge?" and "how much knowledge?" be answered.

A. There is no evidence to support any theory of liability based on *quid pro quo* discrimination.

Quid pro quo discrimination occurs when "the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances." *Kinman*, 94 F.3d at 467. Hostile environment sexual harassment, on the other hand,

> occurs when unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct have the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive environment.

Id.

The present case does not involve *quid pro quo* sexual harassment. There is no allegation and no evidence that Waldrop conditioned Doe's grades, advancement, or placement in his class on her acquiescence to his sexual advances. Doe never testified that she believed, or that Waldrop in any way conveyed, that her grades, advancement, or placement in his class were in any way dependent on maintaining a sexual relationship with him. Indeed, Doe herself has acknowledged the absence of *quid pro quo* evidence. (Petitioners' Fifth Circuit Brief at 11). Thus, the issue presented is narrowed to the standard of liability applied to a school district for hostile environment sexual harassment of a student by a teacher.

B. Doe's agency theory, in the context of this case, is equivalent to strict liability.

Doe asserts that Lago Vista is liable under agency principles because Waldrop was assisted in accomplishing the abuse of a student by his position as a teacher. *See* Restatement (Second) of Agency § 219(2)(d). But, as recognized by the Fifth Circuit, adopting such a standard

> would create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student.

Rosa H., 106 F.3d at 655. An argument could be raised in every case that the teacher's opportunity to take advantage of the student was enhanced by

> the aura of an instructor's authority, the trust that we encourage children to place in their teachers, or merely the opportunity that teachers have to spend time with children.

Id.

Adopting the agency theory proposed by Doe would result in school districts being held liable under Title IX for any sexual misconduct committed by a teacher against a student, regardless of the district's lack of knowledge or its efforts to avoid or remedy the situation. In other words, the district would be strictly liable for a teacher's conduct outside the scope of his or her employment. For reasons stated below, strict liability is not appropriate in this context.

C. Strict liability is not an appropriate standard of liability under Title IX.

This Court declined to determine in *Franklin* whether Title IX was enacted under the Congress' Spending Clause power or under section 5 of the Fourteenth Amendment. 503 U.S. at 75 n.8. It did, however, discuss the contention that monetary damages cannot be recovered for unintentional violations of Spending Clause legislation because "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Id.* The Court ultimately held that a monetary remedy was available in *Franklin*, but in that case, unlike the present case, the school district had actual knowledge of the abuse and failed to take appropriate remedial action. *See id.* at 64. The Court could thus conclude that the district in *Franklin* intentionally violated Title IX. No such conclusion can be reached where, as in the present case, the district has no knowledge of discriminatory conduct. If Lago Vista violated Title IX by not becoming aware of a relationship both parties concealed, its violation was unintentional and it cannot be held liable for damages. *See Franklin*, 503 U.S. at 74 (citing *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981)) (remedies are limited under Spending Clause statutes when violation is unintentional).

The Fifth Circuit has addressed Title IX as Spending Clause legislation and discussed the limitations placed on the statute because of that status. *Leija*, 101 F.3d at 398-99; *see also Davis v. Monroe County Board of Education*, No. 94-9121, 1997 WL 475207 (11th Cir. August 21, 1997) (Eleventh Circuit holds Title IX is Spending Clause legislation). It first noted that, in enacting Spending Clause legislation, "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds." *Leija*, 101 F.3d at 398; *see also Pennhurst*, 451 U.S. at 17 (Congress must speak with clear voice

in imposing conditions on receipt of federal funds). It then rejected strict liability as the standard to be applied because Title IX does not give notice that a school district will be strictly liable for sexual abuse committed by its teachers. *Id.* at 398-99. "Simply put, strict liability is not part of the Title IX contract." *Id.* at 399; *see also Pennhurst*, 451 U.S. at 17 (Spending Clause legislation is in the nature of contract).

Further, imposition of strict liability for teacher-student abuse is not supported by sound policy reasons. As discussed by the Fifth Circuit in *Leija*, analogies to the policy reasons for imposing strict liability on product manufacturers do not support imposing strict liability in this context. School districts do not have the same ability as manufacturers to spread liability costs nor are they in a position to discover human "defects" in the way a manufacturer can discover defects in its products. *Leija*, 101 F.3d at 399.

Imposing liability on a school district when it has neither actual nor constructive knowledge of sexual harassment will not further Title IX's purpose of eradicating sexual discrimination in educational institutions. Despite even exemplary efforts to comply with Title IX, every school district faces the possibility that it will unknowingly hire an abusive teacher or that a teacher with a previously impeccable record will, because of some personal crisis unknown to the district, engage in an illicit relationship with a student. The district, because it does not know of the abuse and has no reason to know of it, will have no opportunity to stop it. Instead, it will face potentially devastating financial liability with every hiring decision it makes. This, in turn, may have an adverse impact not only on future efforts to comply with Title IX, but on the district's ability to carry out its educational mission. Congress did not intend to eradicate sexual discrimination in schools by exposing school districts to potential financial disaster for concealed acts of sexual

discrimination of which the districts have neither actual nor constructive knowledge.

D. Conclusion.

The facts of this case would limit this Court's consideration to the narrow issue of whether a school district can be strictly liable under Title IX for hostile environment harassment of a student by a teacher. Because there is no issue of fact regarding actual or constructive knowledge, Doe's case would fail under any of the other theories proposed. Thus, if this Court rejects strict liability as the appropriate standard of liability, it will have no occasion to go further and determine which standard is appropriate. Such a narrow holding would do little to alleviate the confusion in this area because it does not appear that any of the courts of appeals have adopted strict liability in this context.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 96-1866

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 23, 1996
CERTIORARI GRANTED DECEMBER 5, 1997

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TABLE OF CONTENTS

Contents

Contents

The following orders, opinions and judgments have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

APPENDIX A — RELEVANT DOCKET ENTRIES

Date	Proceedings
November 17, 1993	Plaintiffs Original Petition filed in Travis County District Court
December 16, 1993	Defendant Frank Waldrop's Answer filed
January 31, 1995	Plaintiffs First Amended Petition adding Defendant Lago Vista Independent School District filed
February 27, 1995	Defendant Lago Vista Independent School District's Answer filed
March 2, 1995	Petition for Removal to U.S. District Court for the Western District of Texas filed by Defendant Lago Vista Independent School District
April 13, 1995	Defendant Lago Vista Independent School District's First Amended Original Answer to Plaintiff's First Amended Original Petition filed
September 5, 1995	Plaintiffs' Second Amended Petition filed
November 3, 1995	Plaintiffs' Motion for Partial Summary Judgment filed

Appendix A

November 6, 1995	Defendant Lago Vista Independent School District's Motion for Summary Judgment filed
November 17, 1995	Plaintiffs Response to Defendant Lago Vista Independent School District's Motion for Summary Judgment filed
November 20, 1995	Defendant Lago Vista's Independent School District's Response to Plaintiffs' Motion for Partial Summary Judgment filed
November 28, 1995	Summary Judgment granted for Defendant Lago Vista Independent School District
December 15, 1995	Federal causes of action against Defendant Frank Waldrop dismissed and remaining state law causes of action against said Defendant remanded to state court.
December 15, 1995	Final Judgment for Defendant Lago Vista entered
December 20, 1995	Order correcting clerical error in date of Final Judgment
January 1, 1996	Plaintiffs' Notice of Appeal to the United States Court of Appeals for the Fifth Circuit
February 24, 1997	Judgment affirmed by the U.S. Court of Appeals

APPENDIX B — DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO.
A 95CV 126 SS

JEAN DOE, AS GUARDIAN AND NEXT FRIEND OF JANE DOE

VS.

FRANK NEWTON WALDROP, AND LAGO VISTA INDEPENDENT SCHOOL DISTRICT

DEFENDANTS FIRST AMENDED ORIGINAL ANSWER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES LAGO VISTA INDEPENDENT SCHOOL DISTRICT, one of the Defendants in the above styled and numbered cause, and reserving the right to file other and further pleadings, exceptions and denials, files this, Defendant's First Amended Original Answer to Plaintiff's First Amended Petition herein, and in support thereof would show unto the Court as follows:

I.

The Plaintiff's First Amended Petition fails to state a claim or cause of action against this Defendant upon which relief can be granted, and pursuant to Rule 12(b)(6), Defendant should be

discharged promptly with its costs and Plaintiff's First Amended Petition held for naught.

II.

Defendant admits the allegations contained in paragraph one (1) of Plaintiff's First Amended Original Petition.

III.

Defendant is without sufficient information to admit or deny the averments contained in paragraph two (2) of Plaintiff's First Amended Petition.

IV.

Defendant is without sufficient information to admit or deny the averments contained in Plaintiffs First Amended Petition regarding the Plaintiff's age, when she first encountered FRANK WALDROP, and how she was introduced to Defendant WALDROP. Defendant admits Plaintiff was assigned to Defendant WALDROP's advanced social studies class as a ninth grade. Defendant admits Defendant FRANK WALDROP led a discussion group at Lago Vista High School.

V.

Defendant is without sufficient information to admit or deny the averments contained in paragraph four (4) of Plaintiff's First Amended Petition.

VI.

Defendant denies there is a cause of action for negligent infliction of emotional distress under the law of the State of Texas. Defendant denies the rest of the averments contained in paragraph five (5) of Plaintiff's First Amended Petition.

VII.

Defendant denies the averments contained in paragraph six (6) of Plaintiffs First Amended Petition.

VIII.

Defendant admits Defendant WALDROP was licensed as a teacher by the State of Texas. Defendant denies the remainder of the averments contained in paragraph seven (7) of Plaintiffs First Amended Petition.

IX.

Defendant denies the averments contained in paragraph eight (8) of Plaintiff's First Amended Petition and further denies Title IX of the Education Amendments of 1972 are applicable herein.

X.

Defendant is without sufficient information to admit or deny the averments contained in paragraph nine (9) of Plaintiff's First Amended Petition.

Appendix B

XI.

Defendant admits Defendant WALDROP was employed as a teacher by Defendant LAGO VISTA INDEPENDENT SCHOOL DISTRICT as alleged in paragraph ten (10) of Plaintiff's First Amended Petition. Defendant denies Defendant LAGO VISTA INDEPENDENT SCHOOL DISTRICT knew, or in the exercise of reasonable care should have known of Defendant WALDROP's alleged propensity to engage in improper relations with his female students, and denies Defendant LAGO VISTA INDEPENDENT SCHOOL DISTRICT's was negligent or grossly negligent in any manner in connection with Defendant WALDROP's alleged sexual abuse and harassment of Plaintiff.

XII.

Defendant denies the education amendments of 1972 as set forth in Plaintiff's First Amended Petition apply to this cause of action. Defendant denies the remainder of the allegations contained in paragraph eleven (11) of Plaintiff's First Amended Petition.

XIII.

Defendant denies the averments contained in paragraphs twelve (12) and thirteen (13) of Plaintiffs First Amended Petition.

XIV.

Defendant is without sufficient information to admit or deny the averments contained in paragraph fourteen (14) of Plaintiff's First Amended Petition.

Appendix B

XV.

Defendant denies the averments contained in paragraph fifteen (15) of Plaintiff's First Amended Petition.

XVI.

Defendant denies Plaintiff is entitled to any of the relief requested in the prayer in Plaintiff's First Amended Petition.

XVII.

Defendant denies all Plaintiff's allegations not specifically admitted herein.

XVIII.

For further answer herein, if same be necessary, Defendant affirmatively alleges it is entitled to immunity from liability for all Plaintiff's State Tort claims alleged in Plaintiff's First Amended Petition under §101.001 et. seq. of the Texas Civil Practice and Remedies Code.

WHEREFORE, PREMISES CONSIDERED, Defendant requests the Court discharge this Defendant from all liability in the premises, that Plaintiff take nothing from this action against this Defendant, and that the Court award to this Defendant its cost and attorney's fees expended in the defense hereof and for such other and further relief, both general and special, at law or in equity, to which this Defendant may show itself justly entitled.

Appendix B

Respectfully Submitted,

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APPENDIX C —PLAINTIFFS' SECOND AMENDED PETITION FILED SEPTEMBER 5, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-95CV-126-SS

JEAN DOE, AS GUARDIAN AND NEXT FRIEND OF JANE DOE, A MINOR

VS.

FRANK NEWTON WALDROP AND LAGO VISTA INDEPENDENT SCHOOL DISTRICT

PLAINTIFFS' SECOND AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Jean Doe, individually and as Next Friend of Jane Doe, and Jane Doe, Plaintiffs in the above styled and numbered suit, complaining of Frank Newton Waldrop and Lago Vista Independent School District, and for cause of action would show the Court as follows:

1.

PARTIES

Because of the sensitive nature of the facts made the basis of this suit, Jean Doe and Jane Doe appear pseudonymously, but their identity is well known to the Defendants and will be disclosed to the Court. Defendant Waldrop is an individual

residing in Williamson County, Texas, who has appeared and answered **pro se**. Defendant Lago Vista Independent School District is a political entity located in Travis County, Texas, and has appeared and answered herein.

2.

JURISDICTION

Plaintiffs originally filed this action in state court, but Defendant LAGO VISTA INDEPENDENT SCHOOL DISTRICT removed it to this Court by correctly asserting that certain federal questions are raised by the allegations herein. Specifically, this suit arises in part under Title IX of the Education Amendments of 1972, §§901-909, as amended, 20 U.S.C.A. §§1681-1688, 28 U.S.C. 1983, and the United States Constitution, Amendment XIV.

3.

VENUE

The improper acts and wrongful conduct complained of herein occurred in Travis County, Texas, and venue is proper in the Western District of Texas, Austin Division.

4.

LIABILITY ALLEGATIONS

It became necessary to bring this action because of improper sexual contacts between Jane Doe, who at all times pertinent hereto was a minor, and Defendant Frank Newton Waldrop, who was employed as a teacher by the Lago Vista Independent School

District. This sexual relationship began in the Summer of 1992, and continued until Defendant Waldrop was apprehended by an officer of the Lago Vista Police Department while in the act of sexually abusing the Plaintiff, then fifteen years of age, on January 22, 1993.

5.

Jane Doe was born June 11, 1977. She was thirteen (13) years of age when she first encountered Defendant Frank Waldrop. She was at that time in the eighth grade, participating in an honors class which was led by Defendant's wife, a teacher in the Lago Vista Independent School District Middle School. Mrs. Waldrop referred the minor Plaintiff to a discussion group in the high school which was led by Defendant Waldrop. The following school year, when Jane Doe was a ninth grader, she was assigned to Defendant Waldrop's Social Studies Class.

6.

Over the course of Jane Doe's freshman year in high school, while she was a member of his class, Defendant Waldrop singled her out for special attention and praise, and embarked on a scheme to seduce her. On one occasion, while they were having a private conference in his classroom, Defendant Waldrop flattered her on her maturity, as he had done before, and then suggested to her that their communication was more than they expressed verbally. On other occasions he complimented her physical appearance in a suggestive and seductive manner.

7.

This seduction continued, just before the Spring Break of

that year, with a direct sexual overture which took place in the minor's home. That incident occurred after school, when Defendant Waldrop contrived to deliver a book to the minor for her to use in preparing a report for his class; he selected a time to do so when he knew that she would in all likelihood be at home alone. On this occasion, Defendant Waldrop suggested to Jane Doe that she was sending signals to him of a sexual or romantic nature. He then embraced and kissed her, and insinuated his hand under her clothing.

8.

Defendant Waldrop continued his pursuit of the minor Plaintiff throughout the remainder of the school year. The following summer he arranged to lead a discussion group at the Lago Vista High School, and invited Jane Doe to participate. This discussion group allowed Defendant Waldrop the opportunity to be alone with Jane Doe and to continue his pursuit and seduction of her. This culminated that summer in the initiation of sexual relations with the minor. These relations continued intermittently until Defendant Waldrop was apprehended in the act of intercourse with the minor by an officer of the Lago Vista Police Department in January, 1993.

9.

NEGLIGENCE AND INTENTIONAL INJURY

Defendant Waldrop's sexual exploitation and use of Jane Doe constitutes a negligent and/or intentional infliction of emotional distress, which proximately caused the damages alleged herein.

10.

BATTERY

Defendant Waldrop's conduct constitutes a battery upon Jane Doe in that she was not legally competent to consent to the touching of her body, rendering him strictly liable to her for damages alleged herein.

11.

CIVIL RIGHTS

At all times pertinent hereto, Defendant Waldrop, was licensed as a teacher by the State of Texas, and occupied a position of trust and authority over the minor Plaintiff. Among his other duties, he was responsible for protecting her well-being. His sexual use and exploitation of the minor Plaintiff constitutes sexual harassment, in violation of her personal civil right to be free from such interference and in violation of the rights granted her by the Texas Constitution, Article I, §§3, 3a, the United States Constitution, Amendment XIV, and 28 U.S.C. 1983.

12.

TITLE IX [WALDROP]

Further, Defendant Waldrop's conduct constitutes a betrayal of the special relationship which exists between teacher and student and a violation of her rights to be free from sexual discrimination, guaranteed by Title IX of the Education Amendments of 1972, §§901-909, as amended, 20 U.S.C.A. §§1681-1688.

Appendix C

13.

NEGLIGENCE AND GROSS NEGLIGENCE

[WALDROP]

In addition, Defendant Waldrop was negligent and grossly negligent in failing, after he first developed a sexual attraction for the minor Plaintiff, to seek professional medical and mental health care, in failing to avoid situations in which he would be alone with the minor Plaintiff and in failing to consider the harm that his sexual exploitation of her would cause.

14.

NEGLIGENCE [LAGO VISTA]

At all times pertinent hereto Defendant Waldrop was employed as a teacher by Defendant Lago Vista Independent School District (hereinafter referred to as Lago Vista ISD), and entrusted by that entity with responsibility for the education, care and nurturing of the students of Lago Vista ISD, including the minor Plaintiff. Defendant Lago Vista ISD knew, or in the exercise of reasonable care should have known, that Defendant Waldrop had a propensity to engage in improper relations with his female students, and was negligent and grossly negligent in its failure to supervise Defendant Waldrop and to provide students, including the minor Plaintiff, with adequate safeguards against such sexual abuse and harassment. The negligence of Defendant Lago Vista ISD was a proximate cause of the injuries and damages alleged herein.

Appendix C

15.

TITLE IX [LAGO VISTA]

Defendant Lago Vista ISD is a recipient of Federal funds and is therefore subject to the Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§1681-1688. Title IX of that act prohibits sexual discrimination and harassment based upon sex, and requires school districts to institute positive procedures, mechanisms and policies to eliminate and/or minimize such conduct. Defendant Lago Vista ISD failed to institute adequate procedures, mechanisms and policies and its failure allowed the sexual abuse, harassment and discrimination alleged herein to occur. Consequently, Defendant Lago Vista ISD is liable to the minor Plaintiff for the resulting injuries and damages.

16.

Further, Defendant Lago Vista ISD is strictly liable to the minor Plaintiff for the wrongful conduct of Defendant Waldrop, pursuant to Title IX, Education Act, *supra*. At all times pertinent hereto Defendant Waldrop was acting generally within the scope of the wide discretion that Defendant Lago Vista ISD allowed him, and at all times pertinent hereto Defendant Waldrop was using his position of authority over the minor Plaintiff as a means to extort sexual compliance, so that his conduct with respect to the minor Plaintiff amounts to *quid pro quo* sexual harassment.

Appendix C

17.

ACTUAL DAMAGES

All such wrongful conduct of both defendants was the producing and proximate cause of actual damages to the minor Plaintiff of at least $1,000,000.00, for which the Defendants are jointly and severally liable.

18.

EXEMPLARY DAMAGES

Further, Plaintiffs would show that Defendant Waldrop knew that his conduct created a high risk of serious injury to the minor Plaintiff and that his conduct was reckless and reflects such an entire want of care as to be the equivalent of conscious indifference of the rights, welfare and safety of the minor Plaintiff. Consequently, Defendant Waldrop should be made to pay exemplary damages, as a penalty on Defendant Waldrop for his wrongful conduct and as an example and caution to others against taking advantage of a position of trust and confidence with children such as the minor Plaintiff.

19.

Defendant Lago Vista ISD knew that its failure to adopt adequate procedures and safeguards to protect children from sexual exploitation and harassment created a high degree of risk of serious injury to the students of the district, and its failure amounts to a conscious disregard of the rights, welfare and safety of the rights of those children, including the minor Plaintiff. Consequently, the Defendant Lago Vista ISD should also be

Appendix C

required to pay exemplary damages, as a penalty for its wrongful conduct and as an example and caution to other school districts.

PRAYER

WHEREFORE, PREMISES CONSIDERED, both Defendants having appeared and answered herein, Plaintiffs respectfully pray that upon final judgment they have judgment against both Defendants for their actual damages and for exemplary damages, with pre-judgment and post-judgment interest thereon at the lawful rates, together with their reasonable attorneys' fees and their costs of court, and such other relief, at law and in equity, to which the court and jury may find them justly entitled.

Respectfully submitted,

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Appendix C

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ATTORNEYS FOR PLAINTIFFS

APPENDIX D — DEFENDANT LAGO VISTA INDEPENDENT SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 6, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO.
A-95-CV- 126-SS

JEAN DOE, AS GUARDIAN AND NEXT FRIEND OF JANE DOE, A MINOR, PLAINTIFFS

VS.

FRANK NEWTON WALDROP, AND LAGO VISTA INDEPENDENT SCHOOL DISTRICT, DEFENDANTS

DEFENDANT LAGO VISTA INDEPENDENT SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes the Defendant LAGO VISTA INDEPENDENT SCHOOL DISTRICT (hereinafter LAGO VISTA) and, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, files this its Motion for Summary Judgment, and in support thereof would show unto the Court as follows:

I.

STATEMENT OF THE CASE

Plaintiff, JEAN DOE, as Guardian and Next Friend of JANE

DOE, a minor, filed this lawsuit against FRANK NEWTON WALDROP (hereinafter WALDROP) and LAGO VISTA, claiming violations of state law, Title IX of the Education Amendments of 1972, 28(sic) U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution. As the basis for this lawsuit, Plaintiff contends that while a fifteen year old student at Lago Vista, she was seduced and eventually involved in a sexual relationship with one of her teachers, Defendant WALDROP. The physical sexual relationship between Defendant WALDROP and Plaintiff lasted from approximately early spring 1992 to January of 1993. The relationship ended when the Plaintiff and Defendant WALDROP were discovered in the act of intercourse by a Lago Vista Police Department Police Officer in late January 1993. Plaintiff does not allege, and the evidence will not support an allegation any sexual contact between Plaintiff and Defendant WALDROP took place on the campus of any LAGO VISTA school.

II.

Plaintiff alleges "Defendant LAGO VISTA knew, or in the exercise of reasonable care should have known, that Defendant WALDROP had a propensity to engage in improper relations with his female students, . . ." (Plaintiff's Second Amended Petition, ¶ 14.)

III.

Plaintiff alleges causes of action against LAGO VISTA for negligence, and for violations of the Education Amendments of 1972, §§ 901-909, as amended, 20 U.S.C.A. §§ 1681-1688. Plaintiff additionally alleges a cause of action for violation of Plaintiff's civil rights, (Plaintiff's Second Amended Petition,

¶ 11). However, it is not clear whether Plaintiff limits the civil rights allegation to Defendant WALDROP. Plaintiff does not allege the violation of Plaintiff's civil rights was pursuant to any custom or policy on the part of the LAGO VISTA. However, Defendant will address that issue.

IV.

This Motion for Summary Judgment is based upon;

1. The affidavit of Virginia Collier attached to the Appendix as Exhibit "A" in support of Defendant's Motion for Summary Judgment, and incorporated herein for any and all purposes as though set forth verbatim;

2. the deposition excerpts from the deposition of Virginia Collier attached to the Appendix as Exhibit "B" in support of Defendant's Motion for Summary Judgment, and incorporated herein for any and all purposes as though set forth verbatim;

3. the deposition excerpts of Michael Riggs attached to the Appendix as Exhibit "C" in support of Defendant's Motion for Summary Judgment, and incorporated herein for any and all purposes as though set forth verbatim;

4. the deposition excerpts of Jill Peyton attached to the Appendix as Exhibit "D" in support of Defendant's Motion for Summary Judgment, and incorporated herein for any and all purposes as though set forth verbatim; and

5. the deposition excerpts of the Plaintiff attached to the Appendix as Exhibit "E" in support of Defendant's Motion for Summary Judgment, and incorporated herein for any and all purposes as though set forth verbatim.

V.

DEFENDANT LAGO VISTA IS IMMUNE FROM LIABILITY FOR NEGLIGENCE

Plaintiff contends Defendant LAGO VISTA ". . . was negligent and grossly negligent in its failure to supervise Defendant WALDROP and to provide students, including the minor Plaintiff, with adequate safe guards against such sexual abuse and harassment. The negligence of Defendant LAGO VISTA ISD was approximate cause of the injuries and damages alleged. . ." (¶ 14, Plaintiffs Second Amended Original Petition.) LAGO VISTA would show the Court LAGO VISTA is immune from liability for claims of negligence pursuant to the provisions of the Texas Tort Claims Act. TEX. PRAC & REM. CODE ANN. § 101.051.

> "The law is well settled in (Texas) that an independent school district is an agency of the state and, while exercising governmental functions, is not answerable for its negligence for a suit sounding in tort. See, e.g., *Braun v. Trustees of Victoria Independent School District,* 114 S.W.2d 947 (Tex. Civ. App. — San Antonio 1938, writ ref'd); *Coleman v. Beaumont Independent School District*, 496 S.W.2d 245 (Tex. Civ. App. – Beaumont 1973, writ ref'd n.r.e). The Texas Tort Claims Act was enacted in 1970, and §3 of that act provided for waiver of governmental immunity for the use of publicly-owned motor vehicles, premises defects, and injuries arising out of conditions or use of property. With respect to the liability of a school district, however, the legislature provided for a more limited waiver of immunity. Section 19A of the Act states that a

> school district's liability is limited to causes of action arising from the use of motor vehicles."

Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978).

"The waiver of governmental liability provided for in the Texas Tort Claims Act is in the case of school districts restricted to causes of action arising from the use of motor vehicles. TEX. CIV. PRAC. & REM. CODE ANN. § 101.051 (Vernon 1986)." *Williams v. Conroe Independent School District,* 809 S.W.2d 954, 957 (Tex. App. — Beaumont 1991, no writ).

Additionally, there is no cause of action for negligence under 42 U.S.C. § 1983. *See, Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L.Ed.2d 662 (1986).

VI.

DEFENDANT LAGO VISTA IS NOT LIABLE UNDER 42 U.S.C. § 1983

Plaintiff additionally alleges very generally in ¶ 11 of Plaintiff's Second Amended Petition a cause of action for violation of Plaintiff's civil rights. Defendant is unable to discern from the pleading whether Plaintiff is attempting to allege a cause of action for violation of 42 U.S.C. § 1983 against Defendant LAGO VISTA based on the Second Amended Petition. Consequently, Defendant will address Defendant LAGO VISTA's liability under 42 U.S.C. § 1983. 42 U.S.C. § 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state

> or territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, where other proper proceeding for redress.

In order to prevail on a claim against a school district under § 1983, the Plaintiff must prove three elements:

1. the Plaintiff possesses a Constitutionally protected right or Federal right;

2. the Plaintiff was deprived of that right under color of state law; and

3. the deprivation was caused by "official policy" of the school district.

Parratt v. Taylor, 101 S.Ct. 1908, 1913 (1981); *Monell v. Department of Social Services*, 98 S.Ct. 2018, 2038 (1978). The school district is entitled to summary judgment if any of those elements are missing. Defendant contends it is entitled to summary judgment in this action for the reason two of the elements are missing. First, Defendant WALDROP was not acting under "color of state law" at the time his actions were undertaken. "Section 1983 does not reach purely private conduct." *Hagerty v. Succession of Clement*, 749 F.2d 217, 221 (5th Cir. 1984). A public officials' private acts are not taken under color of state law when his act are "no different from those of any private citizen." *Smith v. Winter,* 782 F.2d 508, 512 (5th Cir. 1986). A state, its agencies, or its officials cannot be

assessed liability for the acts of a private individual, except by fair attribution of those actions to the state. *Lugar v. Edmonsdson Oil Co., Inc.,* 102 S.Ct. 2744, 2753-54 (1982). In the instant case, none of the physical sexual relations between WALDROP and the Plaintiff took place on school property (Deposition of Plaintiff, pp 61-62); and there is no evidence that anyone at LAGO VISTA knew about the relationship between the Plaintiff and WALDROP (Deposition of Plaintiff, p. 64). In fact, the Plaintiff and WALDROP did everything they could to hide the relationship from the people at LAGO VISTA, as well as her own family (Deposition of Plaintiff, pp 64-66). Plaintiff was aware that if she would report the relationship to her family or to people in authority at LAGO VISTA, the relationship would end immediately (Deposition of Plaintiff, p. 67).

Secondly, there is no evidence LAGO VISTA was deliberately indifferent to the existence of a continuing, persistent wide spread practice of unconstitutional misconduct by school district employees, and that the Plaintiff was injured by unconstitutional acts pursuant to the boards custom. It is now clear under the Court's holding in *Doe v. Taylor Independent School District*, 15 F.3rd 433, 454 (5 Cir. 1994) that school districts can be held liable under § 1993 ". . . for supervisory failures resulting in the molestation of (a) student only if those failures 'manifested a deliberate indifference to the welfare of the school children.' " Prior to the decision in Doe, the 10th Circuit set out what Defendant believes to be the appropriate standard for a Plaintiff to hold a school district liable in a 1983 suit. In *Gates v. Unified School District No. 449*, 996 F.2nd 1043, 1041 (10th Cir. 1993), the Court state:

> "In order to hold the school district (board) liable in this 1983 suit, the plaintiff must establish the

existence of a policy adopted by the board or the existence and maintenance of a board custom of failure to receive, investigate or act on complaints of violations of female students' constitutional rights to be free of sexual abuse at the hands of the district's employees. To establish a case based on custom, a plaintiff must prove:

(1) The existence of a continuing, persistent and widespread practice of unconstitutional misconduct by the school district employees;

(2) Deliberate indifference to or tacit approval of such misconduct by the school district's policymaking officials (board) after notice to the officials of that particular misconduct; and

(3) That the plaintiff was injured by virtue of the unconstitutional acts pursuant to the board's custom and that the custom was the moving force behind the unconstitutional acts.

Turning to the facts of the instant case, there is simply no evidence of the existence of a pattern of persistent and widespread unconstitutional practices that have become so permanent and well settled as to have the force and defective law. Nor is there evidence LAGO VISTA had notice of a pattern of unconstitutional acts, or displayed deliberate indifference or tacitly authorized the violation of Plaintiffs constitutional rights. Consequently, the Plaintiff has failed to show, and cannot show a custom or policy of deliberate indifference to, or tacit authorization of WALDROP's conduct on the part of LAGO VISTA. Indeed, the only evidence of knowledge on the part of

the school district of "inappropriate behavior" on the part of WALDROP was met by an investigation by the secondary school principal, Michael Riggs. Upon receiving a complaint from a parent, Mrs. Anna Lee Tully, Mr. Riggs quickly initiated a parent/teacher's meeting to investigate the complaint by Mrs. Tully of inappropriate behavior on the part of Mr. WALDROP. In attendance at the meeting was Mr. and Mrs. Tully, WALDROP and the principal, Michael Riggs. (Deposition of Michael Riggs, pages 20-30; 35; 39-40). Nor was there any knowledge on the part of the superintendent of school district of inappropriate activity on the part of Mr. WALDROP prior to the discovery of the Plaintiff and Mr. WALDROP by the Lago Vista Police Department in January 1993. (Deposition of Virginia Collier, page 65) Dr. Collier also stated the policy in existence at LAGO VISTA at the time was to investigate allegations of inappropriate behavior as Mr. Riggs did in this instance. (Deposition of Virginia Collier, pages 66-72).

VII.

DEFENDANT LAGO VISTA IS NOT LIABLE UNDER TITLE IX

Plaintiff alleges in her Second Amended Petition that Waldrop was acting within the scope of wide discretion LAGO VISTA allowed him, and thus, LAGO VISTA is strictly liable pursuant to Title IX for Waldrop's wrongful conduct. The relevant portion of Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681, reads:

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

> discrimination under any education program or activity receiving Federal financial assistance. . . .

"Program or activity" is defined in the statute as "all of the operations of a local educational agency . . . or other school system." 20 U.S.C. 1687 (West Supp. 1995). Additionally, the definition of "program or entity" does not include the agents of such an entity and ". . . common law agency principals do not apply to claims under Title IX." *Floyd v. Waiters*, 831 F. Supp. 867 (M.D. Ga 1993). In order to prevail, Plaintiff must prove LAGO VISTA acted with the intent to discriminate against her on account of her gender in a federally funded program. *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). Discriminatory intent must be shown. *Guardians Ass'n*, 463 U.S. at 607. There simply is no evidence LAGO VISTA had any intent to discriminate against Jane Doe based on her sex. Even assuming, for purposes of argument only, that Waldrop's actions constitute discrimination based on sex, Waldrop's actions were purely personal, and clearly outside the scope of his employment. In that regard, LAGO VISTA would show, that under Texas law, an employee's conduct occurs within the course and scope of the employment only when the act is in furtherance of the employer's business and for the accomplishment of the purposes for which the employee was hired. *Gifford-Hall & Company v. Moore*, 479 S.W.2d 711, 715 (Tex. Civ. App. – Tyler 1972, no writ.) When an employee departs from his work to accomplish a personal purpose not connected with the employer's business, the relationship of employer and employee is temporarily suspended and the employer is not liable for the employee's acts during the period of suspension. *Southwest Dairy Products Co. v. De Frates*, 132 Tex. 556, 125 S.W.2d 282, 283 (1939).

When the deviation from the employer's business involves purely personal pursuits, the employer is not liable for injury resulting therefrom. *Mitchell v. Ellis*, 374 S.W.2d 333, 336 (Tex. Civ. App. – Fort Worth 1963, writ ref'd); *Hein v. Harris County*, 557 S.W.2d 366, 368 (Tex. Civ. App. – Houston [1st Dist.] 1977, writ ref'd n.r.e.). Thus, Waldrop's actions cannot constitute discrimination under a "program or activity" of LAGO VISTA. See *Floyd*, 831 F. Supp. at 877.

VIII.

CONCLUSION

In conclusion, Defendant LAGO VISTA contends that based upon the foregoing authorities, LAGO VISTA is immune from any negligence cause of action asserted by Plaintiff herein, and that Plaintiff has failed to prove any cause of action against Defendant under 42 U.S.C. § 1983, Title IX of the Education Amendments of 1972, 28(sic) U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution, and consequently Defendant is entitled to judgment as a matter of law in this case.

WHEREFORE, PREMISES CONSIDERED, Defendant LAGO VISTA INDEPENDENT SCHOOL DISTRICT, respectively prays this Court grant, in all things Defendant's Motion for Summary Judgment, and that Defendant recover its cost expended in the defense hereof, and for such other and further relief, both general and special, in law or in equity, to which Defendant may show itself justly entitled.

Appendix D

Respectfully submitted,

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SCHOOL DISTRICT

APPENDIX E — PLAINTIFFS' RESPONSE TO DEFENDANT LAGO VISTA INDEPENDENT SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT FILED NOVEMBER 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-95CV-126-SS

JEAN DOE, AS GUARDIAN AND NEXT FRIEND OF JANE DOE, A MINOR

VS.

FRANK NEWTON WALDROP AND LAGO VISTA INDEPENDENT SCHOOL DISTRICT

PLAINTIFFS' RESPONSE TO DEFENDANT LAGO VISTA INDEPENDENT SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Jean Doe and Jane Doe, Plaintiffs, and respond to the Motion for Summary Judgment filed-herein by Defendant Lago Vista Independent School District as follows:

1.

STATEMENT OF THE CASE

Plaintiffs agree that Defendant Lago Vista Independent School District ("LVISD") has correctly stated the procedural

posture of this case in the opening paragraphs of its Motion. Plaintiffs respectfully request that the Court, in considering the Motion and the arguments presented herein, consider not only the summary judgment evidence filed by Defendant LVISD, but in addition the excerpts from the deposition of Anna Tully, filed herewith as Exhibit A, and the deposition of Bill Mason, filed as Exhibit B. Plaintiffs additionally request that the Court, in considering this Motion, also refer to the depositions filed in conjunction with the Plaintiffs' own Motion for Partial Summary Judgment, and all of that summary judgment evidence is incorporated fully by reference herein.

2.

NEGLIGENCE AND GROSS NEGLIGENCE

As Defendant LVISD states, Plaintiffs had pleaded negligence and gross negligence on the part of that Defendant in its supervision of its teacher, Frank Waldrop. Plaintiffs concede that the State of Texas and all its political subdivisions, including independent school districts, are immune from suits based on negligence and gross negligence (absent certain waivers of that immunity by the Texas Tort Claims Act, none of which apply to these facts). For that reason, Plaintiffs agree that Defendant LVISD's Motion for summary judgment with respect to negligence and gross negligence should be granted.

3.

CIVIL RIGHTS ACTION

In addition to negligence, Plaintiffs also have alleged that Defendant LVISD's conduct, with respect to its supervision of

Frank Waldrop, violated Jane Doe's rights pursuant to 42 U.S.C. §1983. In its discussion of this theory, LVISD acknowledges that pursuant to the majority's holding in *Doe v. Taylor Independent School District*, 15 F.3d 433 (5th Cir. 1994), school districts "can be held liable under §1993 '. . . for supervisory failures resulting in the molestation of (a) student only if those failures "manifested a deliberate indifference to the welfare of the school children." ' " *quoted at page 7 of Defendant's Motion.* By arguing that LVISD officials had no knowledge of Waldrop's sexual exploitation of Jane Doe, LVISD implies an innocence which is not supported by the record. Although those officials may have been ignorant of Waldrop's abuse of Jane Doe, they had been notified of his dangerous propensities to take undue liberties with female students. In October, 1992, after Waldrop had initiated the sexual relationship with Jane Doe, and before that relationship was discovered, Anna Lee Tully, the mother of one female student and the informal guardian of another, made a report to Michael Riggs, then Principal of Lago Vista High School. She reported that both girls were uncomfortable with off-color and suggestive remarks that Waldrop made to them, individually and in private as well as in the classroom context, to the extent that one of the girls was afraid to be alone with Waldrop. Additionally, she reported that Waldrop's conduct in a class consisting only of Jane Doe and one of the girls was particularly bothersome because of the sexual connotations of Waldrop's presentation. In response, Principal Riggs invited Mr. and Mrs. Tully to meet with Waldrop in Riggs's presence. At that meeting, Waldrop indignantly denied any impropriety. **Tully deposition, p. 7, l. 11—p. 12, l. 20**.

This denial was accepted at face value by Riggs, who undertook no independent investigation of the accusations, who failed to make any entry in Waldrop's personnel file concerning

the accusations or the meeting, and who failed even to mention the accusation to his Superintendent, Virginia Collier, until **after** the exposure of Waldrop's abuse of Jane Doe. **Riggs deposition, p. 23, 1. 1 — p. 32, 1. 25** (The Riggs deposition is filed as Exhibit 3 to Plaintiffs' Motion for Partial Summary Judgment.) William Mason, testifying as an expert for the Plaintiffs regarding the standard of care applying to a school district in this circumstance, testified that at a minimum in such a situation the school district should have dismissed the teacher with pay or assigned the teacher to administrative duties not involving students, pending a formal investigation. **Mason deposition, p. 22, 1. 13 — p. 26, 1. 8**.

As the court stated in **Doe v. Taylor ISD, supra**:

> [S]urely the Constitution protects a schoolchild from physical sexual abuse — here, sexually fondling a 15-year old school girl and statutory rape — by a public school teacher. . . . Thus, Jane Doe clearly was deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment. It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment.
>
> 15 F.3d 443, at 451-52 (footnotes omitted).

In **Doe v. Taylor ISD**, the school administrators had received several reports regarding the culprit's misbehavior with the specific claimant. In this case, there are fewer reports and the reports relate directly to misbehavior with other students and

only incidentally involved the minor plaintiff herein. Nevertheless, in this summary judgment proceeding it is clear that the pleadings and evidence raise a fact question concerning the test for institutional liability set out in **Doe v. Taylor ISD**:

> (1) the defendant [school district] learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.
>
> 15 F.3rd 443, at 454.

Lago Vista Independent School District having been informed by Mrs. Tully of Waldrop's misbehavior toward and in the presence of Mrs. Tully's daughter and ward, and having been informed specifically that his conduct in the presence of Jane Doe was particularly inappropriate, demonstrated deliberate indifference. Principal Riggs's failure to do that which Mr. Mason testified should have been done may not have prevented but certainly would have arrested the injury that was being done to Jane Doe, perhaps at least sparing her the notoriety that resulted from the public disclosure of her victimization.

Appendix E

4.

TITLE IX ACTION

Defendant LVISD apparently does not deny that by accepting federal funds it is subject to all the requirements of the federal Education Amendments. That it does receive such funding is fully established by the summary judgment evidence filed in connection with Plaintiffs' Motion for Partial Summary Judgment, and incorporated herein.

One would not know, from reading Defendant LVISD's discussion of the obligations imposed on school districts by Title IX of the Education Amendments of 1972, 10 U.S.C. Sec. 1681 (a), that the Supreme Court of the United States had issued an opinion relating to a school district's obligation to a female student when a male teacher has taken advantage of his position and sexually exploited that student. But the Court has written on the subject, and unequivocally established that a civil action for damages **against the school district** arises when that occurs. **Franklin v. Gwinnett County Public Schools**, 112 S.Ct. 1028 (U.S. 1992). The factual basis of that holding is remarkably similar to the facts proved herein, particularly in the summary judgment evidence tendered in connection with Plaintiffs' Motion for Partial Summary Judgment.

As more fully argued in Plaintiffs' Motion for Partial Summary Judgment, we believe that LVISD's liability under Title IX is established as a matter of law. At the very least, in view of the undisputed facts herein, a fact issue regarding its liability is present.

Appendix E

5.

CONCLUSION

As stated above, we concede that Defendant LVISD is immune from complaints based on negligence and gross negligence. Having removed this suit to Federal Court, however, LVISD should not be allowed to evade its obligations arising under Federal law. Waldrop unquestionably abused and exploited a fourteen-year-old student and continued to do so for several months. He gained her confidence and had access to her solely as a result of the position of trust he occupied through LVISD. He was allowed to continue this pattern of exploitation and abuse even after a concerned parent made express and direct complaints concerning his conduct toward female students, some of which involved Jane Doe. LVISD's administrator, rather than investigating these complaints and removing Waldrop from the classroom as he should have, brushed them under the rug. This amounts to violations of Jane Doe's rights under the Fourteenth Amendment and under Title IX, and she is entitled to compensation for the resulting damages.

WHEREFORE, premises considered, Plaintiffs pray that Defendant Lago Vista Independent School District's Motion for Summary Judgment be DENIED.

Respectfully submitted,

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Appendix E

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APPENDIX F — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION FILED DECEMBER 15, 1995

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

NO. A 95 CA 126 SS

JEAN DOE, AS GUARDIAN AND NEXT FRIEND OF JANE DOE

VS.

FRANK NEWTON WALDROP and LAGO VISTA INDEPENDENT SCHOOL DISTRICT

FINAL JUDGMENT

BE IT REMEMBERED that by order dated November 28, 1995, the Court granted Defendant Lago Vista Independent School District's Motion for Summary Judgment as to all causes of action asserted against it by Jean Doe, as Guardian and Next Friend of Jane Doe, a minor. On December 1, 1995, the Court entered an order of dismissal without prejudice of all cross-claims asserted by Lago Vista Independent School District against Frank Newton Waldrop. By order dated this same day, the federal causes of action asserted by Plaintiffs Jean Doe, as Guardian and Next Friend of Jane Doe, a minor, against Frank Newton Waldrop were dismissed by request of the Plaintiffs and the remaining state law causes of action against Frank Newton Waldrop were remanded to state court. All claims before this Court having been disposed of or otherwise resolved, the Court enters the following final judgment:

Appendix F

IT IS ORDERED, ADJUDGED, AND DECREED that Jean Doe, as Guardian and Next Friend of Jane Doe, a minor, TAKE NOTHING by her causes of action asserted against Lago Vista Independent School District, and that each party absorb its or her own costs.

SIGNED and ENTERED on this 15 day of November 1995.

s/ S. Sparks
UNITED STATES DISTRICT JUDGE

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION FILED DECEMBER 20, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

NO. A95 CA 126 SS

JEAN DOE, AS GUARDIAN AND NEXT FRIEND OF JANE DOE

VS.

FRANK NEWTON WALDROP and LAGO VISTA INDEPENDENT SCHOOL DISTRICT

ORDER

BE IT REMEMBERED on this the 20th day of December 1995 it was brought to the Court's attention that a clerical error exists in the Final Judgment filed in the above-referenced matter on December 15, 1995. The Final Judgment states that it is "signed and entered on this 15th day of November 1995." The Final Judgment was actually signed and entered on the 15th day of December 1995.

Accordingly, pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, the Court enters the following order:

IT IS ORDERED that the Final Judgment in the above-styled and -numbered action is AMENDED and CORRECTED to reflect the true date it was signed and entered by this Court, December 15, 1995.

Appendix G

SIGNED on this 20th day of December 1995.

s/ S. Sparks
UNITED STATES DISTRICT JUDGE

APPENDIX H — AFFIDAVIT OF VIRGINIA SUE COLLIER WITH ATTACHMENTS DATED NOVEMBER 3, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO.
A-95-CV-126-SS

JEAN DOE, AS GUARDIAN AND NEXT FRIEND OF JANE DOE, A MINOR, PLAINTIFFS

VS.

FRANK NEWTON WALDROP, AND LAGO VISTA INDEPENDENT SCHOOL DISTRICT, DEFENDANTS

AFFIDAVIT

State of Texas §

County of Washington §

Before me, the undersigned authority, on this date personally appeared VIRGINIA SUE COLLIER, who, being by me duly sworn, deposed as follows:

"My name is VIRGINIA SUE COLLIER. I am over the age of 21 years, of sound mind, fully competent to make this affidavit, and I have personal knowledge of the facts stated herein and that they are all true and correct.

'It is my testimony I was the superintendent of Lago Vista

Independent School District from the years 1990 through 1994. As the superintendent of Lago Vista Independent School District, I was aware of the policies and procedures in effect at Lago Vista Independent School District during that period of time. As the superintendent of Lago Vista Independent School District, I was the custodian of the policies and procedures of the district. Attached hereto are ten pages of policies and procedures from Lago Vista Independent School District. These said ten pages of records are kept by Lago Vista Independent School District in the regular course of business, and it was the regular course of business of Lago Vista Independent School District for an employee or representative of Lago Vista Independent School District with knowledge of the act, event or policy recorded to make the records or to transmit information thereof to be included in such records; and the records were made at or near the time or reasonably soon thereafter. The records attached hereto are exact duplicates of the originals, with the exception of the first two pages of Butler exhibit 22 which are exact duplicates other than the name, position, address and telephone numbers are not completed. Otherwise they are exact duplicates of the records.

'It is further my testimony the written policy attached hereto and marked Butler Exhibit No. 9 was in fact the policy at Lago Vista Independent School District during the period from 1989 to 1993. The policies and procedures reflected in Butler Exhibits No. 7 and 22 evidence the policies that were in effect at Lago Vista Independent School District during the period from at least October, 1992 through January, 1993.

'The policy at Lago Vista Independent School District during my entire tenure from 1990 to 1944 there was that it was absolutely prohibited for teachers to engage in sexual contact

of any description with students. I was unaware of any complaint or allegation prior to January 1993 of any inappropriate sexual comments, overtures or conduct toward any students, including the Plaintiff, by Frank Waldrop. The policy at Lago Vista Independent School District in the event of a complaint by a parent, student or a teacher of inappropriate comments or conduct on the part of a teacher would be to investigate the complaint.

'Further, affiant sayeth not."

s/ Virginia Sue Collier
VIRGINIA SUE COLLIER

SWORN TO AND SUBSCRIBED before me on the 3rd day of November, 1995.

s/ Lois Helle
Notary Public for the State of Texas

My commission expires on October 31, 1996

Appendix H

EMPLOYEE STANDARDS OF CONDUCT

* * *

SEXUAL HARASSMENT	District employees shall not engage in sexual harassment of students. Sexual harassment includes such activities as engaging in sexually oriented conversations, telephoning students at home or elsewhere to solicit unwelcome special relationships, physical contact that would reasonably be construed as sexual in nature, and threatening or enticing students to engage in sexual behavior in exchange for grades or other school-related benefit. *20 U.S.C. 1681(a); Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028 (1992)*

* * *

SEXUAL HARASSMENT	A student or parent who has a complaint alleging sexual harassment or offensive intimidating conduct of a sexual nature may request a conference with the principal or designee. The principal or designee shall schedule and hold a conference with the student and/or parent within five days, and shall be responsible for coordinating an appropriate investigation of the complaint. The investigation shall ordinarily be completed within ten days. The student or parent shall be informed in the event of extenuating circumstances delaying the investigation.

Appendix H

If the outcome of the investigation is not to the student's satisfaction, an appeal may be made in accordance with FNG (LOCAL) beginning at Level Two.

However, this procedure shall not have the affect of requiring a student alleging sexual harassment or offensive intimidating conduct of a sexual nature to present the matter to a person who is the subject of the complaint. The initial conference with the student ordinarily shall be held by the principal or designee who is the same gender as the student.

* * *

[65] QUESTIONS BY MR. RALLS:

Q. Dr. Collier, I've got a few questions for you.

A. Okay.

Q. As you know, I'm Mark Ralls. I'm here representing Lago Vista Independent School District.

I want to ask you some questions, first of all, specifically with regard to Frank Waldrop and his conduct prior to January of 1993.

Prior to January of 1993, had you, as the Lago Vista Independent School District superintendent, gotten wind or heard rumors in any manner of Frank Waldrop engaging in any sort of improper conduct with students?

A. Absolutely not.

Q. Had you — had you been made aware by any source, whether it be students, faculty, staff, parents, law enforcement agencies, of the possibility that Frank Waldrop may be engaging in any sort of improper activities with his students?

A. No.

Q. Had you heard any rumors or insinuations of any inappropriate behavior on the part of Frank [66] Waldrop with his students?

A. No.

Q. Had that occurred before January 22nd, 1993, the date of his arrest, what would Lago Vista Independent School District's response to that have been?

A. We would have immediately investigated.

Q. And if the investigation had, in fact, confirmed inappropriate conduct on Mr. Waldrop's part, what would the school district, pursuant to its policies, have done?

A. We would have pursued termination.

Q. Let me ask you to look at what has previously been marked as Butler Deposition Exhibit No. 9.

Do you know whether Butler Exhibit No. 9 was in effect at Lago Vista Independent School District from the period 1989 until 1992?

A. I have no reason to feel that it was not.

Q. Okay.

A. Yes. It would have been.

Q. Do you have an understanding, after reviewing Butler Deposition Exhibit No. 9, whether it applies to prohibit sexual contact, harassment, or any sort of offensive sexual conduct between [67] employees and employees, or also employees and students, that is, teachers and students?

A. It says, "Employees shall not engage in conduct constituting sexual harassment," and I would assume that to apply to everybody: Teachers, students, anybody.

Q. All right. Whether it actually is read to apply to everybody or not, was that, in fact, the policy at Lago Vista Independent School District during the period 1989 to 1993?

A. Yes.

Q. That is that teachers would not engage in sexual contact of any description with their students?

A. Absolutely not.

* * *

APPENDIX I — EXCERPTED DEPOSITION OF STAR GEBSER DATED AUGUST 16, 1995

[commencing at page 22]

* * *

All right. Let me just go ahead and move sort of to your — how you met Frank Waldrop and that sort of thing. When was the first class that you had with Frank Waldrop?

A. Well, I met him before the first class with him.

Q. Okay. When did you first meet him?

A. The middle school and the high school basically share one campus. Commonly, students walk back and forth for a class in one building or the other. When I was in 8th grade, I was in the gifted and talented program in the middle school, which was taught by his wife.

[23] Q. And what is her name?

A. Trudy Waldrop.

Q. Okay.

A. We had a great books discussion group, and it became apparent that I was dominating the group because no one else either bothered to read the works or was willing to speak up about what they thought about them, so it was decided by both Ms. Waldrop and Mr. Waldrop and myself that it would be good for me to move up to the high school group because the discussions would be more on par. So I started attending the high school great books discussions, which were led by Mr. Waldrop.

Appendix I

Q. And were those discussions that were held after regular school hours or during regular school hours?

A. No. They were during Lago's equivalent of home room.

Q. How long did you attend that discussion group with Mr. Waldrop?

A. I'm not really sure. Several weeks.

Q. Do you remember what part of the year it was that you began the discussion group in the [24] high school campus?

A. Not really.

Q. Do you remember how long you were actually with Trudy Waldrop's discussion group before moving to Frank Waldrop's discussion group?

A. I'm not sure.

Q. After the — after you moved into the 9th grade discussion group or high school discussion group with Frank Waldrop, did you — did you have any other contact with him, other than through that group, for the remainder of that school year?

A. Well, Lago's such a small school and the campus is so tiny that you can't help but see people in the halls and pass them and things like that, but other than just seeing him around the campus, no.

* * *

Appendix I

[42] * * *

Q. Okay. When was the first time that he made a verbal advance, what you considered to be a verbal advance towards you?

A. Well, he didn't usually say things that were blatantly and obviously sexual. But through — he started doing it my freshman — the first half of my freshman year, and the second half of my freshman year, he had escalated it. He would make comments that he knew only I would understand, references to books, plays, theories and things that he knew I had researched and none of the others had. It was a small enough class that he knew us all very well. Sort of singling me out, and making it apparent that he thought that I was mentally much more mature than he believed the others to be.

Q. All right. Well, even in retrospect, you don't consider the fact that he considered you mentally more mature than the others to be sexually suggestive, do you?

A. Well, at the time I didn't, but he would make comments and things, just things like [43] comments about practicing Tantra magic and things like that that he knew no one else would understand. And when he made that particular comment, I had just finished a project on reincarnation, and I've always been sort of a student of — of miscellaneous religions. And Tantra was something that I didn't — you know, it was just a word. I didn't know what it meant, so at the time, I just smiled and pretended like I understood. And so at the time, that didn't really register to me as anything, except that he said it sort of oddly. And since thing, I've learned what Tantra really is, which is sex magic. And I guess that would be the first really screamingly blatant time that he made verbal advances toward me.

* * *

[48] * * *

Q. Okay. When was the first time that — well, let's see if we can short cut this a little bit.

As I understand the history of the relationship with your relationship with Mr. Waldrop as far as the — what progressed into the sexual relationship, the first time that there was actually any overt attempt to engage you in any sort of physical activity was when he came to your house ostensibly to deliver a book?

A. Yes.

Q. And what happened on that occasion?

A. He came to the door. He — well, he drove up. He came to the door. His adopted son — I think his name's Augie (phonetic), was sitting in the car and he left him there. I think he had a book or something. I'm not sure. And I was home alone, and I went and answered the door, and I let him [49] in. And he had a book on the Celts that I had needed for a project that I was working on.

It was, I think, the day before he and several other of the students were going to leave on a trip to London and Paris. They were going to be gone for I think two weeks. And so he needed to give me the book that day or else I wouldn't have it for that whole long time period.

He handed me the book, and I can't remember exactly what was said, but basically, he, from what I can remember, told me that he knew that I was more mature than the others at the school or he told me that — he told me that — it's hard to remember.

He — I'll tell you what he did. I can remember that. He embraced me and kissed me, fondled my breasts. I was wearing

a T-shirt and blue jeans, which is what I normally wore. He unzipped my pants and put his hands in and fondled my genitalia, with a technical speed. He told me he loved me and that — he said something about like how [50] he loved my peach fuzz or something like that while he was fondling me. I asked him repeatedly what about your son, who was sitting in the car outside, and he said, oh, Augie will be fine. He's got a book, or something like that. He wasn't real concerned. And basically, then he left to take his son home.

Q. All right. So let me make sure that — what I want to do is tie down the exact time frame of that. I think you have told Ms. Vasquez or Doctor Vasquez previously that that was right before spring break of your freshman year?

A. Yeah.

Q. Do you remember the date?

A. I've always been bad at remembering exact dates.

Q. Okay. Spring break of your freshman year would have been in the spring of 1992. Is that correct?

A. I think so.

* * *

[52] * * *

You knew at the time that Mr. Waldrop did that to you in your house that that was inappropriate conduct on his part?

A. Yes.

Q. There was no question about that?

A. Yes.

Q. A teacher should not do that with his student.

A. Yes.

Q. You recognized that?

A. Yes.

Q. And you recognized that you could report that to your mother or your father?

A. Not really.

Q. All right. Did you recognize that you could report it to someone else at school?

A. Well, it was the — that incident was, at [53] the time, the first absolutely blatant, no questions, no mistaking, sexual advance that he had made towards me. The other things had all been double entendre and, quote, references, things like that. You know, the sort of thing that if you knew the references that he was making, you would understand, but if you didn't, it would seem innocent.

I was terrified. I had no idea what I was supposed to do. I had trusted him. I had believed him. I — you know, he was basically my mentor. And it was terrifying. He was the main teacher at the school with whom I had discussions, and I didn't know what to do.

Q. And you didn't — it did not occur to you to report that incident to your parents?

A. No.

Q. Didn't even occur to you?

A. No. I was terrified.

Q. Did it occur — and it did not occur to you to report it to someone at the school in a position of authority?

A. No.

Q. [54] Is it your testimony that without some written instruction provided to you by the school that you wouldn't have the — the knowledge that was required to report that to either your parents or someone in the school?

A. I didn't know what I was supposed to do. I had heard — the only exposure to anything like that to even have the concept that that could happen was, you know, references on TV and stuff about female students marrying their professors. I had no idea that that stuff actually happened.

Q. Well, once you found out that it actually happened as it did in your situation, you didn't feel like you could report it to your parents?

A. No.

Q. Did you want to report it to somebody?

A. I wanted to have somebody to help me figure out what I should do.

Q. All right. Did you discuss it with your friends?

A. The only person I discussed it with was Jimmy Navarro.

[55] Q. And when did you discuss it with Jimmy Navarro?

A. After the incident at my house and before he came back from Europe.

Q. Okay. Well, so within the next two weeks?

A. Yes.

Q. Okay. And who is Jimmy Navarro?

A. Jimmy Navarro is a man that I knew from school, is a class — not a classmate really but he attended the same school. He was a couple of years older. The reason I spoke to him was two main reasons. I knew that he was just about always brutally honest. Even when most people would lie to protect someone's feelings, he would tell you the truth. And because I knew that if I asked him to, I could probably trust him not to say anything to anyone.

* * *

[58] Q. All right. So at least — so you don't know [59] of anyone at Lago Vista that knew about that relationship at that point in time?

A. That's correct.

* * *

[60] * * *

Q. And — all right.

Okay. Other than Simon and Jimmy, do you know of anyone else that this incident was communicated to before January 1993?

A. No. If Mr. Waldrop told anyone, I wouldn't know about it, but that's as far as I know. And I don't know when Jimmy told Simon.

* * *

[61] * * *

Q. Okay. Was there ever an occasion that you [62] and Mr. Waldrop engaged in sexual intercourse at — on the grounds of Lago Vista High School or Junior High?

A. No.

Q. Was there ever an occasion when you had any sort of physical contact on the campuses of any Lago Vista Independent School District school?

A. No.

Q. No?

A. No.

Q. At any point — well, when was the first time that you, if you can put a date on it, actually had sexual intercourse with him?

A. I'm not sure, but it was pretty shortly after they got back from Europe.

Q. So it was sometime in the early spring of 1992?

A. Yes.

Q. And how often would you have sexual intercourse with him?

A. At first it was pretty infrequent. Then for the summer — I had a great interest in taking AP classes, advanced placement. That's where you take a class in high school [63] and take a test and get college credit for it. He arranged to teach AP psychology and I think history, both, over the summer. Lago didn't have regular summer classes. This would be an informal group that met about once a week, and, you know, we'd read our books and write essays and things, and then when the time for the test came, we'd take it. We wouldn't have gotten high school credit for it, I don't believe.

There were, I think, two others originally who signed up to be involved in this class. Only one showed up for the first meeting, which was in Mr. Waldrop's room out at Lago. I don't think he ever, ever intended to actually teach the class. Eventually, I was the — well, after that first meeting, I was the only student who went. And basically, he would pick me up from my house about once a week with the — made comments about studying psychology, and would say it in such a way that it, to me and him, it was obviously just a different way of saying having sex.

And when the school year started up [64] again, I was in psychology and sociology with him. It was — I don't remember which was first and which was second, but one semester we

studied psychology and the next semester we studied sociology. And there were several other students in the class. The GT program that year had basically been gutted, so we didn't have like a specific class that we went to that was GT. And he would — either as I was leaving the class or as I was passing by in the hallway or things like that, he would sort of draw me aside and ask if my schedule worked out to study psychology that day, or something like that. And I basically just went along with what he said.

Q. All right. Did you have, at that time or in retrospect, any information that would lead you to believe that anyone at Lago Vista Independent School District knew about this relationship between you and Mr. Waldrop?

A. The sexual one or the one about having a summer class?

Q. The sexual one.

A. Not that I know of.

[65] Q. Is it your belief that Lago Vista Independent School District administration and people in authority over there should have known merely by virtue of the fact that you were the only one in his class that something was going on?

A. I think that they should have noticed that he was spending way too much time with me. I mean, then, it made me feel special. I thought, wow, you know, he actually thinks I'm intelligent enough to pay attention to me to give me all this special attention. In retrospect, I think that they — I mean, this should have been setting off sirens in their heads.

Q. And certainly, you could have set off all those sirens yourself. True?

A. Yes.

Q. And all you had to do was report it to someone. True?

A. Yes. But I felt that if I did that, then, one, I wouldn't — obviously, I wouldn't be in his class anymore and I wouldn't have, I guess, sort of the intellectual companionship that I was getting with him.

[66] Q. The reason you didn't report it is because you wanted the relationship to continue?

A. The intellectual one, yes. I wasn't real thrilled about the sexual one, but it seemed to me that that was a necessary component, and that if I was to blow the whistle on that, then I wouldn't be able to have this person as a teacher anymore. And that was my main interest in any relationship with him.

Q. And you did what you could to hide the relationship from your parents and the people at Lago Vista Independent School District?

A. Yes. Because I was ashamed of it. I felt like I had — I felt like in responding to the comments that he had made, trying to act like an adult, that I had sort of led him on, and I felt like I really sort of almost had a duty to go on and not, you know — to not be a tease. I felt like I had — at the time, I felt like I had been seducing him and that was why I had to go along and, you know, basically put my money where my mouth was.

* * *

[67] * * *

Q. There's no question in your mind as you sit here today or even then, that if you were to report the relationship to your parents or people in authority at Lago Vista Independent School District, the relationship would end immediately?

A. Yes.

Q. And there's no question in your mind as you sit here today or as the — thinking back to that time of the relationship, that it was an inappropriate relationship?

A. Yes — I felt that it was inappropriate.

Q. And that teachers and students should not be doing that?

A. That's correct.

Q. And there's no question whatsoever that you [68] personally never reported the incident to anyone in a position of authority that could have done something about it?

A. That's correct.

Q. And there's no question that you needed that instruction, that is, that you could report it and should report it in writing, to report it?

A. I didn't know what I was supposed to do. I — I mean, Mr. Waldrop was the person in Lago administration, I guess, if you want to call it, who I most trusted, and he was the one that I would have been making the complaint against. I — I didn't know what I was supposed to do.

* * *

[69] * * *

A. Okay. I decided my sophomore year that I wanted to graduate a year early because it seemed to me that that would be a way that without being discovered, without bringing it to light, that I could get out of it without having his disapproval.

Q. So that you could end the relationship on your own. Is that what you're saying? If you did that, without incurring his disapproval?

A. Yes.

Q. Okay. But your intentions were to continue to keep the relationship secret?

A. I was ashamed of it and I didn't want anyone to know, yes.

Q. And part of the reason that you wanted to continue to keep the relationship secret is because you didn't want to go against the [70] wishes of Mr. Waldrop?

A. That's correct.

Q. And can you see as you sit here today, looking back, any circumstance that would have changed your intention to keep the relationship secret and go against the wishes of Mr. Waldrop?

A. If I had known at the beginning what I was supposed to do when a teacher starts making sexual advances towards me, I probably would have reported it. I was bewildered and terrified

and I had no idea where to go from where I was. I was really depressed and, I mean, people around me were noticing that I was all freaked out and were asking me what was wrong, but I wouldn't tell anyone because I was — I didn't want anyone to know because I felt I had been leading him on and I felt ashamed.

Q. And you didn't want to go against the wishes of Mr. Waldrop?

A. Right then, if I had known what to do, I would have reported it, but I was so terrified, I didn't know what to do.

Q. You didn't even know to report it to your [71] parents?

A. No.

* * *

[75] * * *

Q. You never did believe, even when the [76] relationship was ongoing, that Lago Vista tolerated that sort of contact between teachers and students, did you?

A. I was never led to believe that, no.

* * *

[106] * * *

Q. Did you have a sexual relationship with Billy Barch (phonetic) before January 1993?

A. Yes.

Q. Who was Billy Barch?

A. Billy Barch is a guy I met at the Kerrville Folk Festival.

Q. And what — when was that that you met him?

A. It was the spring festival after the — [107] after Mr. Waldrop had made advances towards me my freshman year.

Q. So spring '92, the same — I mean, within the same time frame?

A. Yes.

Q. Okay. So within — or strike that.

So would it have been when Mr. Waldrop was in Europe that you met him?

A. No. It was after he had come back and after we had had a sexual relationship.

Q. After you and Mr. Waldrop had had a sexual relationship?

A. Yes.

Q. Okay. So you were — how many times did you have sex with Billy Barch?

A. I don't really know.

Q. More than once?

A. Yes.

Q. So is it true, then, that you and Billy Barch were having a sexual relationship at the same time you and Frank Waldrop were having a sexual relationship?

A. Yes. And, in fact, he — Mr. Waldrop encouraged me in it. He would say things like, I don't want to be your only lover, [108] just your best. Things like that.

Q. Would he encourage you to have sex with Billy Barch specifically, or would he just —

A. No. He had never met him.

Q. He didn't want exclusivity.

A. That's correct. And he made a point of saying that.

Q. So it wasn't that he was really encouraging you to have sex with a specific individual, it was just that he wanted you to feel free to have a relationship with someone else. Is that correct?

A. That is correct. And also, he implied that it would be sort of suspicious if I didn't have some other relationship that the world could know about.

Q. You didn't have the relationship with Billy Barch in order to cover up your relationship with Frank Waldrop, did you?

A. No.

Q. You would have had that relationship with Billy Barch

regardless of your relationship with Frank Waldrop, wouldn't you?

A. I don't really think so.

* * *

APPENDIX J — EXCERPTED DEPOSITION OF VIRGINIA COLLIER DATED JUNE 30, 1995

[commencing at page 22] * * *

Q. During the time that you were superintendent of the Lago Vista district, who was the person who was designated — I think the correct terminology is the Title 9 coordinator?

A. Me.

Q. Okay. And so, if Mr. Butler says that that's his position now, then I'm going to gather that that's — the superintendent's job encompasses that obligation?

A. In a very small district, you don't really have [23] anyone else to give it to.

Q. And what does the superintendent — I mean — I'm sorry. What does the coordinator of Title 9 — what narrow responsibilities — of all the responsibilities of the superintendent, what does that entail?

A. That entails assuring that the laws related to — to Title 9 or that equity is — is there for students and teachers.

Q. Equity as — particularly as it relates to gender discrimination?

A. Particularly.

Q. It is true — is it true that Lago Vista district is the — was, at the time you were superintendent, recipient of federal funding?

A. We would have received cafeteria food money and special education, yes.

* * *

Appendix J

[25] * * *

Q. Narrowing the focus to issues related to sexual harassment, sexual exploitation, a term that may not exist in the category, but you understand what I mean?

A. Uh-huh.

Q. Seductive behavior by an adult toward a minor, [26] just for a shorthand definition of that terminology, have you attended specific programs that had that as a topic or the topic?

A. Yes.

Q. Did you attend such programs while you were superintendent of Lago Vista?

A. Yes.

Q. And can you tell us what you recall about those specific programs that you attended while you were a superintendent at Lago Vista?

A. As I recall, they were all done by attorneys.

Q. Which attorneys?

A. I — I would not recall.

Q. The district's attorneys?

A. One — one was the district's attorney, because we had the attorney come out to the district and do a special work session with all the staff, but —

Appendix J

Q. Was that before or after Mr. Waldrop's arrest?

A. That was after. That was after. Before, I would have attended at professional meetings like the superintendents summer conference, or the TASA/TASB conference that occurs every fall.

I had attended — I can't tell [27] you exactly how many — one or two sessions on sexual harassment. And those were, in my memory, generally done by attorneys.

Q. The thing you mentioned after Mr. Waldrop's address (sic), was that in a way of preparing the district — personnel of the district for what was feared to be a coming lawsuit by Jane Doe? Or was it a way of dealing with the issues that were raised in people's minds by the arrest of Mr. Waldrop?

A. It actually wasn't close to Mr. Waldrop. It didn't grow out of Mr. Waldrop's incident, per se, at all by itself. It was a response to both that incident and the Doe versus Taylor ruling.

Q. All right. Doe versus Taylor is a case that school administrators have all taken note of, I gather?

A. If you're smart.

* * *

[28] * * *

Q. Okay. Before Mr. Waldrop's address (sic), was there a person designated by the district — or more than one person, perhaps, designated by the Lago Vista district whose responsibility it was

to accept complaints or expressions of — of uncertainty by students who felt that they were the victims of sexual discrimination or sexual harassment in some fashion?

[29] A. The principals would have been the ones that a student would have gone directly to with that kind of complaint.

Q. Okay. Before Mr. Waldrop's address — arrest, was there any form of communication to the student body to alert them to the fact that if they felt that they were the victims of sexual discrimination, sexual harassment, sex abuse, that it was a principal of their school that they should go to with these complaints?

A. I don't know. That would have been a campus issue.

Q. It would not have been a district issue?

A. I would have expected it to be addressed by the principals. And whether they had it in their handbooks, whether they — the handbook would have been the logical place for it to be. I don't know.

Q. I was just going to ask you —

A. I don't remember. I mean, I'll look.

Q. I was just going to ask you if you recalled whether the handbook had any printed —

A. No.

Q. — information, during the time that you were superintendent, that alerted the students in [30] any fashion to any sort of reporting program or system?

A. I don't remember.

Q. Are you aware that Title 9 implementing regulations either recommend or require that there be such a system and that the students be informed directly of the system's existence?

A. If it was required, I think you'll find it in the handbooks.

Q. Okay. My question was: Are you aware of today whether Title 9's implementing regulations do require that?

A. No.

* * *

[52] Q. Day-to-day contact — conduct of his duties as a teacher, how much immediate supervision is there of a secondary school teacher in the Lago Vista district when you were there?

A. By the principal?

Q. By the principal or anyone in the administration?

A. By the superintendent, there would be little or none. By the principal, obviously, it's a small campus, and the principal is moving around the campus during the day, walking the halls, moving in and out of classrooms. It would be sporadic, I guess, would be the word.

Q. By the very nature of the teaching process, the teacher has a great deal of access to the students in a group context —

A. Correct.

Q. — and in a one-on-one context, correct?

A. Correct.

Q. And the teacher is allowed and encouraged, is he not, to exercise a good deal of discretion in the manner in which he deals with the students to maximize the possibility of them learning what they need to learn?

A. Yes.

[53] Q. Mr. Waldrop, I understand, and other teachers used the school facilities, the building and so forth, to conduct extracurricular activities after regular school hours with students?

A. Yes.

Q. And during the summer months?

A. To some degree, yes.

* * *

[79] * * *

Q. — I'm not arguing with you. But would you agree with me that if there had been such a complaint by a parent, even if — even if the school official had been unable to substantiate that complaint, prove it, and had not informed you before January of '93, that school official certainly should have notified you of that complaint after January of '93?

A. Yes.

MR. RALLS: Let me just object as to it being vague.

THE WITNESS: I would assume that yes. I would have expected to be notified if there had been a complaint. Mr. Riggs and I went back over every complaint I [80] think he'd ever had about Frank Waldrop, reviewing those after the fact, trying to see if we'd missed something that was in there. So I can't imagine that there was something we didn't discuss.

APPENDIX K — EXCERPTED DEPOSITION OF MICHAEL RIGGS DATED AUGUST 28, 1995

[Commencing at page 4]

* * *

Q. All right. What is your employment?

A. I'm the secondary school principal at Lago Vista Independent School District.

* * *

[20] * * *

Q. Was there ever an occasion in which any parent ever made any complaint to you with respect to Mr. Waldrop's manner or presentation to his classes?

A. Yes.

Q. When?

A. Let's see. I think this was — it was in the fall. Probably latter part of October.

Q. Of '92?

[21] A. Yes.

Q. Was it — are we talking about a single incident or more than one incident?

A. Single incident.

Q. And who complained?

A. Anna Lee Tully.

Q. Did she call you on the phone, or did she come to your office?

A. As I recall, I believe she called me on the phone, and to —

Q. And what did she say?

A. She was concerned about some remarks made in the classroom that she felt was inappropriate.

Q. And she's the parent of?

A. Angie Marchitto and Lisa Marchitto.

* * *

Q. And can you recall what exactly it was that they said that Mr. Waldrop had said?

A. He had made remark such as — and I don't think [22] it was specifically to Angie. I think Angie just was basically offended by the remark.

But he made a remark toward a girl student that she had filled out over the summer, and a remark toward a boy student, something about the size of the belt buckle.

Q. Well, I can see how a girl might take offense at someone remarking out in the open that they had filled out over the summer depending on how that was said. But what is it about a belt buckle that they said was offensive?

A. I think that there was some, I assume, interpretation on their part that it had anything to do (sic) with what was under the belt buckle. They didn't get specific.

Q. You're referring to a comparison between a belt buckle and a sexual organ or an abdomen?

A. I assume. It wasn't discussed any further than that.

Q. And this was all conveyed to you by Mrs. Tully on the telephone?

A. I think she called on the telephone. We did have a parent meeting.

Q. There was an actual meeting?

A. Yes.

[23] Q. How soon after the call?

A. I don't remember the exact time relationship. Within the next day, probably. Next day or two. We scheduled a meeting with Mr. and Mrs. Tully and Mr. Waldrop during his conference period at school.

* * *

[26] * * *

Q. Okay. So then the meeting took place in your office?

A. In my office.

Q. And what happened?

A. We sat around the round table and made the appropriate introductions, make sure everybody knew who each other was. They cordially greeted each other.

Then I indicated that, you know, "The reason we're gathered here is because Mrs. Tully hade some concerns over remarks that were said in the classroom, and I wanted her to be able to convey these to you personally and have you respond to those."

So at that time, Mrs. Tully indicated, you know, her concern over these kind of remarks being made.

Q. And how did Mr. Waldrop react to that?

A. He basically indicated that, he said, "Well, I didn't mean to say anything that would be [27] offensive to anybody, and if I did offend anybody, you know, I apologize for it."

Q. Did he acknowledge having used basically the terminology that was quoted to you, or did he deny that?

A. He didn't really deny it, but he basically just like I had indicated, you know, said, "I just didn't think that anything I had said was offensive, and you know, if I offended, you know, the girls by it, I apologize for it, and it won't happen again," something like that.

Q. How long did this meeting occur or take place?

A. Oh, I'm sure 40, 45 minutes probably, just 30 — 30 to 45, just discussion back and forth. I don't recall a great deal of the content of it, but that was basically what it revolved around.

* * *

[28] * * *

Q. Did you express an opinion either at the meeting or at any time before or after the meeting to Mr. Waldrop about your opinion of the propriety of the kind of remarks that he was accused of having been made — having made?

A. Yes. I just indicated to him that, as a teacher, you need to be careful of the type of remarks that you do make. They may or may not be considered offensive to students. And when you make a remark that may or may not allow them to look on one side or the other of it, generally speaking, you know, they probably would look at the derogatory connotation of the remark, and so, you know, I would encourage him not to make those kind of remarks in the [29] future. And he seemed to be very conscientious of that.

Q. Well, are you telling us that your own personal opinion was that the remarks were improper or that they were just ill-advised because they were capable of being misinterpreted?

A. I would think ill-advised. It's better not to make them at all so that they wouldn't be construed to be one way or the other.

Q. One way or the other?

A. Well, improper. Somebody may take it complimentary, and others might be offended by it. That's all I meant.

* * *

[30] * * *

Q. Did you consider it a sign of concern that a teacher of Mr. Waldrop's maturity and experience would need to have something like that conveyed to him — some information like that conveyed to him?

A. I suppose so.

Q. Did you express that concern to him?

A. No, not in that regard, no.

Q. Did you express that concern to anyone else?

A. No.

Q. Was it surprising to you that a person of his maturity and years of experience in the military and years of experience teaching should have to have something like this told to him?

A. Yes.

Q. Mr. Riggs, I've early on asked to get the entire personnel file of Mr. Waldrop from the school district and was given a considerable stack of paper, but there is no indication of this meeting in that stack of paper.

Can you tell me whether the notes about this meeting were

withheld from [31] that or whether there were no notes in his personnel file?

A. I don't recall taking specific notes at the meeting.

* * *

Q. Do you think that the fact that a meeting like this occurred should or should not go into a teacher's personnel file?

A. Possibly it should go in there, but I didn't do any — I don't recall making a written record of the meeting other than informing the superintendent that the meeting had taken place.

Q. Say that last part again. I didn't understand it.

A. Other than informing the superintendent that the meeting had taken place, that I had requested that they have a parent/teacher conference.

Q. I was going to ask you about that as well. But [32] I just want to be clear with you that there was no written record concerning this parent/teacher conference ever made by you or by anyone else to your knowledge; true statement?

A. Yes.

Q. Okay. Now, you testified that you did, however, make this conference — make Virginia Collier aware of this conference?

A. Yes. After this other situation came up with Jane Doe.

Q. Not until after Frank Waldrop's relationship with Jane Doe was disclosed?

A. Uh-huh.

Q. Is that — you have to give us a yes or a no.

A. Yes.

Q. Why did you not see fit to report it to the superintendent before that?

A. I didn't feel like that, at the time, that it was that — that significant. I just felt like something that — I should handle it in my office with the parent and the teacher involved. And I felt like that, after the meeting that we held, that, you know, that that situation was resolved.

* * *

* * *

[35] * * *

Q. When did you first become aware of any relationship between Mr. Waldrop and Jane Doe?

A. When the incident of concern took place.

Q. When you were notified that they were arrested —

A. Yes.

Q. — or he was arrested?

A. Yes.

Appendix K

Q. Did you learn that the day of the arrest?

A. Day of the arrest.

* * *

APPENDIX L — EXCERPTED DEPOSITION OF ANNA LEE TULLY DATED SEPTEMBER 28, 1995

[Commencing at page 5]

* * *

Q. Okay. When you lived in Lago Vista, tell us who were the members of your household?

A. We have five children and at various times some or all of them were with us. We also had two girls living with us who were not our children at part of that time, and one of them was a student in the school district in Lago Vista. Her name is Erica Neil.

Q. And what were the circumstances that led to her [6] living with you?

A. Erica moved to Lago Vista with her mom after her parents divorced, and was in high school there, and making very good grades. Her mom remarried and was transferred to, I believe it was, Michigan. And because Erica was aiming for valedictorian, she wanted to stay in the Lago Vista school district. And she was a good friend of one of my daughters, and we thought a lot of her, so we invited her to stay with us for her last two years of high school.

Q. Now, what two years were those?

A. Her junior year and senior year, I believe that was '92-'93 and '93-'94 school year,

Q. And the daughter that Erica Neil was close to, what was her first name?

A. Her name is Angie. They were classmates.

Q. And during that '92 through '94 period, did you have other daughters living at home who were in the Lago Vista High School?

A. Yes, our youngest daughter is Lisa. Both Lisa and Angie have the last name of Marchitto, M A R C H I T T O. And they're known by that name at school.

Q. All right. Now, during the period that we're [7] talking about, were you acquainted with a teacher in the Lago Vista district known as Frank — Frank Waldrop?

A. Yes, sir.

Q. And what was the basis of that acquaintance?

A. He was — all three of our children were in his class at some point in time.

Q. All right. Did you know him on any other basis than as this teacher of your daughters?

A. I only knew him through the school.

Q. All right. Did there come a time that any of the three girls living in your home and attending Lago Vista schools came home and made a report to you about something that had happened in school that one or more of them felt was inappropriate?

A. Yes.

Q. Can you remember approximately when that was?

A. Yes, it was at the beginning of the fall, 1992-'93 school year which was Angie and Erica's junior year of school. And specifically a couple of days — a couple of days before school started.

Q. Okay. So —

A. During the registration time.

[8] Q. Sometime in September, early September?

A. It was probably the end of August.

Q. All right.

A. Just before school started.

Q. And you said it was Angie and Erica's what year in school?

A. Junior year.

Q. All right.

A. Lisa was a sophomore.

Q. Did the two girls together make some sort of report to you or was it one or the other of them, or —

A. At this time it was Angie.

Q. All right. What did Angie tell you?

A. She said that when she went up to the school to check her schedule, she was crossing the parking lot and had some books in her hand and Mr. Waldrop met her and looked her up and down and said, "Haven't you filled out?"

Angie said, "I might have gained a little weight," she's extremely skinny.

And he said to her, "That's not what I mean." She reported to me that that made her feel very uncomfortable. And —

Q. How soon after this incident did Angie talk to [9] you about it?

A. I — I think: that she did not tell me about it at that time, it was later, probably around the beginning of October when she told me about it.

Q. Was there any other report from any of the other girls relating to anything that made them uncomfortable at school?

A. Yes.

Q. In the fall of '92?

A. Yes.

Q. Who was involved in this incident?

A. Both Lisa and Erica also commented, Lisa was the first to comment. And then — and that's the time that Angie reported what I've just told you, and Erica also gave us some information.

Q. Okay. Let's just start with Lisa. What did Lisa tell you?

A. Lisa reported that whenever Mr. Waldrop looked at her, she felt like he was looking at her up and down. She came home from school this particular day and I think — think it was in October, and said that she had been assigned a D-hall class after school for that day. But when she saw that Mr. Waldrop was the teacher [10] on duty, she did not stay. She just left and came home.

She said, "Mom, I'm not going to stay in the room with him because I feel uncomfortable with him. And I didn't want to run the risk of being the only student there," being a small school district, probably very few kids would be there that day. She not know whether or not she might be the only one.

And I said, "Why does he make you feel uncomfortable?"

And she said, "Because when he looks at me, he looks me up and down and looks like he's looking straight through me".

Q. What — excuse me, I may have interrupted you, did Lisa report any suggestive remarks or any comments had been made by this teacher?

A. Well, yes. I was trying to get some information out of her to understand why she felt this way, And she said, "Well" — I said, "Well, has he ever said anything to you?"

And she said, "Not to me specifically," but she said, "At the end of school last year, one day in class he made a comment to the boys in front of the entire [11] class and said 'does the size of your belt buckle determine the size of what's underneath it' ".

Q. And this was — would have been the spring of — spring of '92, I gather?

A. Yes.

Q. Now, you mentioned that Erica also made some comment or some report to you, is that — did I understand that correctly?

A. Right.

Q. What did she report?

A. She was in a class at this time in October of '92 for gifted students. And she — there was one other person in her class and it was the person Jane Doe.

Q. Okay.

A. Excuse me, I'm very dry. She said that — I was — I was questioning her — questioning all three of the girls because they weren't offering information and I was wanting to know why they felt uncomfortable. And she said that Mr. Waldrop hadn't really — had not really taught nor tested them yet. And that in the class most of the time was spent in conversation. And much of that was strange and [12] uncomfortable to the point of having sexual connotations as well as telling off-colored jokes and stories that Mr. Waldrop found very amusing, but that made she, Erica, feel very uncomfortable.

Q. Who all was in this class besides Erica and Jane Doe, what other students?

A. That was it.

Q. Just the two of them?

A. Uh-huh.

* * *

Q. After getting this information, did you discuss it with your husband?

A. Yes.

Q. And did you and he then, together, take any action with respect to the information or the [13] reports that the girls had made to you?

A. Yes.

Q. What action?

A. We called Mr. Riggs, the school principal, and I set up an appointment to talk to him. And we did go to see him one morning.

Q. Did you meet with him in his office?

A. Yes.

* * *

[14] * * *

Q. All right. Now, what did you tell Mr. Riggs or [15] what did

you and your husband tell Mr. Riggs and Mr. Waldrop was the reason that you were concerned or upset?

A. The reason was because of some — some complaints that Angie and Erica and Lisa had made against Mr. Waldrop's treatment of them.

Q. And did you tell them not just generally speaking that the girls had made complaint, did you tell them what the complaints were?

A. Yes.

Q. And did you tell them in more or less the same terms that you just described it to us, and to the ladies and gentlemen of the jury?

A. Yes.

Q. Is there any doubt in your mind that Mr. Riggs understood the information that you were conveying to him?

A. None.

Q. Okay. And what was their reaction to this information?

A. Well, Mr. Riggs' reaction was what I would have expected of any school principal. He — he told us that he would discuss the matter with Mr. Waldrop and for us to let him know if we had any more concerns, or if anything else [16] happened. And Mr. Waldrop —

Q. Let me — let me interject the question. What was Mr. Waldrop's reaction?

A. His reaction was — let's see. He seemed shocked, and insulted, and he just couldn't imagine that anybody would make such a claim.

Q. Did he suggest the girls had just fabricated these remarks, or did he suggest that he had been misunderstood?

A. I think he worded it that maybe — I think he thought they were lying. He thought they were lying, and didn't know why they would lie about that.

Q. Was Mr. Waldrop convincing in his protests, in his denial of having done or said anything improper?

A. Not to me.

* * *

No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

What is the proper standard of liability of a school district under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1994), for a teacher's sexual harassment of a pupil?

LIST OF PARTIES

The Petitioners are Alida Star Gebser and her mother, Alida Jean McCullough.[1] Respondent is Lago Vista Independent School District.

1. This suit was filed when Alida Gebser was a minor. The pseudonyms "Jane Doe" and "Jean Doe" were used to designate her and her mother, Alida Jean McCullough, who sued as her next friend. Alida Gebser having become an adult, the Petitioners have chosen to use their legal names.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Contents

OPINIONS BELOW

The opinion of the court of appeals, Petition Appendix [hereinafter "Pet. App."] 11a-16a, is reported at 106 F.3d 1223 (5th Cir. 1997). The opinion of the district court, Pet. App. 1a-10a, is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals, Pet. App. 17a-18a, was entered on February 24, 1997. The petition for a writ of certiorari was filed on May 23, 1997, and was granted on December 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . . .

STATEMENT OF FACTS

This case concerns the liability of a school district for the sexual exploitation of Alida Star Gebser, one of its students, by a male teacher. The record reveals that Frank Waldrop, the student's teacher and trusted mentor, targeted Gebser with an escalating campaign of sexual predation, beginning with special attention and sexual innuendo in the classroom and culminating in unlawful acts of sexual intercourse when she was fourteen years of age. Waldrop capitalized upon his professional position as a teacher,

and the authority that Respondent granted to him, to prey on Gebser's vulnerabilities. Respondent, having put Waldrop in this position of authority, failed to take any measures to prevent sexual harassment, failed to provide Gebser with any information designed to help her recognize such harassment, and failed to provide her with any procedure by which she could notify anyone of the harassment. Initially flattered by her teacher's attentions, unable to recognize the inappropriateness of his behavior until it was too late, unaware of any person to whom she could turn for help, and convinced by Waldrop to keep his actions a secret, Gebser submitted to Waldrop in order to retain her position as his student. At issue is whether the school district's lack of actual knowledge of its teacher's misconduct insulates it from liability under Title IX.[2]

The district court granted summary judgment in favor of Respondent, and the Fifth Circuit affirmed. The Fifth Circuit held that a school district could not be liable for its teacher's sexual discrimination against students *unless* an administrator with supervisory powers over the offending teacher gains actual knowledge of the misconduct *and* the supervisor then fails to take prompt and effective remedial action. These are the facts of record:

In middle school Gebser was placed in a gifted and talented program taught by Trudy Waldrop, the wife of Frank Waldrop. Because of Gebser's precocity, Mrs. Waldrop and her husband arranged for Gebser to attend a great books discussion group at the high school, led by Mr. Waldrop. Joint Appendix [hereinafter, J.A.] 51a. At that time, Gebser was thirteen years old. Frank Waldrop was a mature man who had taken up teaching after retiring from the military. J.A. 81a. In her freshman year of high school, when she was fourteen, this contact between Gebser and Waldrop became a formal student-teacher relationship. Waldrop began singling

2. The teacher, who is not a party in this action, was employed by Respondent, a public school district in Texas that receives federal funding, J.A. 69a.

Gebser out for special attention because, she thought, of her intellectual qualities. J.A. 53a.

Waldrop initiated his approach to Gebser by making suggestive remarks to her in the presence of other students. The remarks seemed in retrospect calculated to flatter her for understanding them while introducing a covert sexuality into their teacher-student relationship. On one occasion during class discussion, for example, he made a reference to "Tantra," believing that Gebser alone would understand that "Tantra" was "sex magic." J.A. 53a. Throughout this period, Waldrop continued what amounted to a covert flirtation with Gebser by making suggestive but ambiguous remarks in the classroom. At this time, however, Gebser did not recognize anything inappropriate in Waldrop's behavior. J.A. 53a.

Such remarks continued through Gebser's freshman year. J.A. 53a. But events took a sudden turn with an event just before spring break of her freshman year, 1992. J.A. 55a. Waldrop came to Gebser's home, when she was alone there, to deliver a book that she needed for a school project. J.A. 53a. While they were alone there together, Waldrop flattered Gebser on her maturity and then took the opportunity to embrace and kiss her and to fondle her breasts and genitals. J.A. 54a-55a. As Gebser testified:

> [T]hat incident was, at the time, the first absolutely blatant, no questions, no mistaking, sexual advance that he had made towards me. The other things had all been double entendre and, quote, references, things like that. You know, the sort of thing that if you knew the references that he was making, you would understand, but if you didn't, it would seem innocent.
>
> I was terrified. I had no idea what I was supposed to do. I had trusted him. I had believed him. I — you know, he was basically my mentor. And it was

> terrifying. He was the main teacher at the school with whom I had discussions, and I didn't know what to do.

J.A. 56a. A sexual relationship between the two, including repeated acts of sexual intercourse, began a short time later. J.A. 59a-60a.

The following Summer of 1992, by which time Gebser had turned fifteen years of age, Waldrop arranged to teach an Advanced Placement (AP) class for which Gebser hoped to receive college credit. J.A. 60a. It was the only AP class taught in her school that summer, and Gebser's only opportunity to obtain college level credit. *Id.* Although one or two other students signed up for that class, after the first meeting only Gebser attended, leaving her alone with Waldrop throughout this period. During that summer Waldrop had sexual relations with Gebser regularly. J.A. 60a.

> [B]asically, he would pick me up from my house about once a week with the — made comments about studying psychology, and would say it in such a way that it, to me and him, it was obviously just a different way of saying having sex.

Id.

After the fall semester began, Gebser was again assigned to Waldrop's classes. Gebser testified that Respondent had all but terminated the Gifted and Talented program at Lago Vista High School. J.A. 61a. Gebser's only means of getting the educational programs she needed depended on the good graces of Waldrop; it was Waldrop alone who offered her advanced classes in sociology and psychology, and the record clearly indicates that he used his official position as Gebser's teacher to propose sexual interludes:

> [H]e would — either as I was leaving the class or as I was passing by in the hallway or things like that,

> he would sort of draw me aside and ask if my schedule worked out to study psychology that day, or something like that. And I basically just went along with what he said.

J.A. 60a-61a.

This pattern of sexual contact continued until they were apprehended by a law enforcement officer who happened upon them while they were engaged in sexual activity. J.A. 83a.

Gebser testified that she knew Waldrop's sexual contact with her was wrong. J.A. 55a-56a. She explained her reaction to him by saying that she had trusted him as a mentor and the teacher she worked with most closely in the school. J.A. 63a. This attitude persisted even though, after he initiated sexual relations with her, Waldrop encouraged her to have sex with a boy near her age, because "it would be sort of suspicious if I didn't have some other relationship that the world could know about." J.A. 67a.

Gebser testified that she talked to one or two of her friends about her situation in a general way, without identifying Waldrop by name. J.A. 58a. But she did not report Waldrop's preliminary advances either to her family or to any school officials or teachers. Waldrop, not surprisingly, used his influence over Gebser to persuade her to keep his actions secret. J.A. 64a. She did not inform her family because "I was terrified." J.A. 56a. She did not complain to any school official or teacher in part because she knew that if she informed anyone of his behavior, "then I wouldn't be able to have this person as a teacher anymore and that was my main interest in any relationship with him." J.A. 62a. This would have included the advanced courses taught by Waldrop and the college level course offered only by Waldrop as well as the Gifted and Talented courses. J.A. 60a-61a. Moreover, Gebser explained,

> Mr. Waldrop was the person in the Lago administration, I guess, if you want to call it, who I most trusted, and he was the one that I would have been making the complaint against. I — I didn't know what I was supposed to do.

J.A. 63a.

Gebser "didn't know what to do" because the school district did nothing to inform her or other students about how to respond to sexual harassment or other discrimination. Although Respondent claims to have formally adopted an anti-discrimination policy, J.A. 43a-50a, that policy was never communicated to the students. Virginia Collier, the school superintendent during the relevant period, appointed herself as the nominal Title IX coordinator, and was responsible for school district efforts to prevent sexual discrimination. J.A. 69a. Yet Collier admitted that no specific person was appointed by the district to receive complaints of inappropriate sexual conduct or harassment, as required by Department of Education regulations. Instead, Collier said that the principals of each school would have received such complaints. J.A. 71a-72a. Again, there is no indication that this was ever communicated to the students in any fashion, as is also required by Department of Education regulations in place well before the events in question. Nor could Collier point to any steps taken by the school board, such as district-wide meetings or counseling of the faculty, to prevent or discourage sexual contact between faculty and students, until after the relationship between Waldrop and Gebser had been discovered. J.A. 70a-71a.

Just as Respondent failed to educate its faculty about the risks of sexual discrimination and the official policy prohibiting it, Respondent also failed to communicate any information to the students that would have helped them recognize sexual

discrimination and sexually harassing behavior. Gebser, despite her precocity, was completely naive on this subject, and testified that her "only exposure to anything like that . . . was . . . references on TV and stuff about female students marrying their professors. I had no idea that that stuff actually happened." J.A. 57a. There were simply no procedures in place to prevent or even discourage harassment by teachers, no effort to notify the students of what to do in the event harassment occurred, and no procedures to allow them to report it.

The importance of early intervention is illustrated by another set of inappropriate sexual approaches by Waldrop to three other schoolgirls. Despite the lack of formal complaint procedures, the parents and guardians of these three girls did complain about remarks Waldrop made in the presence of the girls. Those remarks were strikingly similar to those employed by Waldrop in the early stage of his approach to Gebser. On each occasion, Waldrop's initial strategy was to make ambiguously suggestive remarks that were easily denied if challenged.[3] In these instances, Waldrop reportedly made specific references to a girl's figure, and made a suggestive remark in the presence of another concerning a male student's anatomy. J.A. 87a-90a. In addition, one of the girls told her mother "that whenever Mr. Waldrop looked at her, she felt like he was looking at her up and down." J.A. 89a. Another said that, in a Gifted and Talented class attended only by her and Gebser,

> most of the time was spent in conversation. And that much of that was strange and uncomfortable to the point of having sexual connotations as well as telling off-colored jokes and stories that Mr. Waldrop

---

3. Waldrop's pattern of using double-entendres as a means to illicitly sexualize the teacher-student relationship, while maintaining deniability should the teacher be caught, is not unique. *See Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1016-17 (7th Cir. 1997).

> found very amusing, but that made [the girl] feel very uncomfortable.

J.A. 90a.

The girls' parents and guardians complained directly to the high school principal, Martin Riggs, describing the girls' complaints in detail. J.A. 92a. Riggs arranged a meeting between the parents and guardians and Waldrop, at which Waldrop denied making any suggestive remarks. J.A. 91a-93a. Riggs accepted Waldrop's denial of the incidents and of any bad intentions and left the matter at that. J.A. 92a-93a.

Riggs conducted no investigation beyond meeting with Waldrop and Mr. and Mrs. Tully. Because Gebser was the only other student in the class in which some of the comments were made, J.A. 90a, it is at least possible that an investigation might have revealed his then ongoing conduct with Gebser. Nor did Riggs make any written notes of the meeting between Waldrop and the Tully family, or make any entry in Waldrop's personnel file about the accusations against him. J.A. 81a-82a. Principal Riggs also failed to report the incident to Superintendent Collier, until after the sexual contact between Waldrop and Gebser was discovered. J.A. 82a-83a. Collier agreed that the incident should have been reported to her, J.A. 74a-75a, though there was no established procedure for doing so.

Even though Riggs failed to investigate the complaints about Waldrop, and passively accepted his denials, the complaints by the Tully family appear to have curtailed Waldrop's inappropriate conduct with respect to their daughters. Gebser, however, lacked the experience to recognize Waldrop's behavior as sexually harassing and discriminatory until it was too late. Once she was seduced into a sexual relationship with Waldrop, she testified that she was terrified, J.A. 57a, ashamed and depressed, J.A. 65a, and "freaked out." J.A. 65a.

Gebser testified that she "wanted to have somebody to help me figure out what I should do." J.A. 58a.

> If I had known at the beginning what I was supposed to do when teacher starts making sexual advances towards me, I probably would have reported it. I was bewildered and terrified and I had no idea where to go from where I was.

J.A. 64a.

Because the school district failed to provide her with basic information that would have helped her to identify the harassment for what it was, and because the school district failed to tell her of any complaint procedure, she told no one. Instead of finding a remedy within the school system, Gebser, in clear child-like fashion, sought an avenue of escape that would avoid the situation: her solution was to try to graduate early from high school as "a way that without being discovered, without bringing it to light, that I could get out of it without having his disapproval." J.A. 64a.

STATEMENT OF THE CASE

Petitioners originally filed this suit against Waldrop in state court alleging violation of state tort law. Subsequently, Petitioners amended their suit to join Respondent as a defendant, alleging violations of Gebser's rights under the Civil Rights Act of 1866, 42 U.S.C. § 1983 (1994), and under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a) [hereinafter "Title IX"]. Subsequently, on Respondent's motion, the case was removed to Federal district court.

Shortly before the case was to be called for trial, the United States District Court for the Western District of Texas granted

Respondent's Motion for Summary Judgment with a memorandum opinion. Pet. App. 1a-10a. Regarding Title IX, the court held that the school district could not be liable absent a showing of actual or constructive notice of the discriminatory conduct and that, as a matter of law, there was no summary judgment evidence of either actual or constructive notice.

Because no federal question had been alleged against Waldrop, on Petitioners' motion the complaint against him was remanded to state court, resulting in a final judgment in the action against the school district. J.A. 39a-42a. That judgment was appealed to the Court of Appeals for the Fifth Circuit. A three-judge panel unanimously affirmed the lower court's judgment, and issued its opinion. Pet. App. 11a-16a. That court held that a school district could never be liable for sexual harassment of students by teachers unless an official with supervisory power over the offending employee had actual knowledge of the misconduct and failed to take remedial action.

SUMMARY OF THE ARGUMENT

Preventing the sexual abuse of young girls by male teachers is at the very heart of Title IX's statutory guarantee against discrimination on the basis of sex. As the Court affirmed in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), sexual harassment is a potent form of discrimination on the basis of sex in the educational context, just as it is in the employment context. Moreover, in both contexts, one of the most severe forms of sexual harassment occurs when those who have been granted power and authority over others — teachers over students and supervisors over employees — use that power to extract sexual gratification. Sexual abuse of this sort invariably is conducted by an individual agent, and almost invariably in secret. The question that arises in both contexts, and that is raised by this case, is the liability of the school or employer that empowered the offending agent for the resulting harm.

In the employment setting, in which the affected employees are adults and there is no *in loco parentis* obligation, the Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), did not permit an employer that had no adequate procedures to receive complaints of harassment to rely on its lack of knowledge of harassment by its agents as a defense. The question before the Court in this case is whether a less demanding standard of care should apply when the bearer of the supervisory power is a teacher rather than a workforce supervisor and when the victim is not an adult but a child as to whom the school district exercises *in loco parentis* obligations.

The comparison to Title VII and to the question of employer liability for harassment that has arisen under that statute is crucial. We maintain that both the text of Title IX, which requires that persons "shall not be subject to discrimination under [federally funded] programs," and the distinct context in which it operates, particularly at the elementary and secondary level, call for a higher level of institutional responsibility for sex discrimination and sexual harassment under educational programs than Title VII calls for on the part of employers.

We then proceed to examine three standards of school district liability, the first of which — actual notice — should be decisively rejected as inconsistent with Title IX. By requiring proof of actual knowledge by a school district official of a teacher's misconduct, the Fifth Circuit holds school boards to a lower standard of procedural care than is currently the law for employers. Not only does an actual notice standard misconstrue the text of Title IX, but it provides no incentive for school boards to establish and publicize procedures by which students may readily complain of improper conduct before it escalates to the damaging level seen in this case. On the contrary, the rational response of a school district to the actual notice standard is assiduously to avoid receiving complaints and thereby become aware of sexual misconduct by its agents. By

discouraging schools from adequately protecting children from sexual predation, the Fifth Circuit standard undermines the core statutory purposes of Title IX and must be rejected.

Petitioners propose two alternative standards of school district liability for cases of abuse under Title IX. A plaintiff in a Title IX harassment case should be able to prevail under either standard.

First, we urge the Court to impose a modified constructive notice standard like that followed by a number of courts under Title VII: School districts should be liable for sexual harassment of which they knew or should have known, *or for which they afforded no reasonable avenue for complaint and redress*. No school board should be able to rely on lack of constructive or actual notice as a defense to liability for sexual harassment under its programs *unless* it had promulgated and publicized adequate procedures — adequate in light of the age and maturity of the students they are designed to protect — to uncover and stop inappropriate teacher behavior as soon as possible. The establishment and publication of such procedures was *required* by Department of Education regulations for recipients of federal funds well before the events at issue here. In the absence of such adequate and required procedures, the school district should be liable for harassment and other forms of intentional sex discrimination, at least by its own agents.

Second, we contend that the distinct language and purpose of Title IX, and the unique context in which it operates, calls for vicarious liability for intentional discrimination, such as harassment, that is carried out by teachers or others who are aided in doing so by their authority over the student victim. Such vicarious liability is consistent with traditional common law agency principles under which a principal is responsible for the harms committed by its agent where the commission of such harms is facilitated by the powers entrusted to the agent. The proposed liability standard is also consistent with guidelines issued by the Department of

Education. Such vicarious liability would provide a strong incentive for school districts vigilantly to police sexual misconduct by their agents and to create effective complaint and investigative procedures, and is most consistent with the responsibility of school districts under Title IX to insure that students are not "subject to discrimination" under educational programs.

Under either standard, the Fifth Circuit's inflexible and irrational requirement of actual knowledge must be rejected. An ignorance-is-salvation approach is inconsistent with the duty owed schoolchildren under Title IX.

ARGUMENT

I.

THE TEXT AND CONTEXT OF TITLE IX, AS COMPARED TO TITLE VII, CALL FOR BROADER SCHOOL DISTRICT RESPONSIBILITY FOR DISCRIMINATION UNDER ITS PROGRAMS, AND PARTICULARLY BY TEACHERS AND OTHERS WHO EXERCISE AUTHORITY OVER STUDENTS IN THOSE PROGRAMS.

Title IX requires that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1994). In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court recognized that a teacher's sexual harassment, and in particular sexual abuse, of a young student constitutes a form of discrimination under Title IX for which damages are available:

> Unquestionably, Title IX placed on the Gwinnett County Public School the duty not to discriminate

> on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

503 U.S. at 75.

At issue in *Franklin* was whether a private right of action for money damages would lie under Title IX.[4] In deciding that question, the Court did not decide the standard under which school boards should be held liable for the misconduct of their subordinates. At the same time, the Court suggested that intentional discrimination in the form of sexual harassment by teachers did constitute an actionable violation of a school district's obligations under Title IX.[5] We contend that this suggestion reflects a proper understanding of school district liability under Title IX, and should be adopted as the law.

Franklin also introduced the analogy to sexual harassment under Title VII and the parallel between supervisor harassment of employees and teacher harassment of students. Employers empower supervisors to control many terms and conditions of employment for employees: supervisors exercise much of the

4. The Court had previously recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX is enforceable through an implied private right of action.

5. In *Franklin* itself, there was ample evidence that school officials knew of the teacher's abuse and discouraged the victim from filing a complaint against him. 503 U.S. at 63-64.

employer's power to hire, fire, demote, and discipline employees and to set their conditions of employment. Similarly, school districts empower teachers not only to instruct students, but also to assign grades, to impose discipline, to control much of their behavior, and generally to manage the school environment. Sexual harassment by supervisors, like sexual harassment of students by teachers, constitutes intentional discrimination on the basis of sex by imposing severely disparate conditions of employment or education. *See Franklin*, 503 U.S. at 74-75.

This analogy has led most courts of appeal under Title IX to adopt standards of liability based on Title VII caselaw, and to adopt in turn the agency principles to which the Court directed courts in *Meritor*. *See Krakunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495, 514 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 899-900 (1st Cir. 1988). Other courts, including the Fifth Circuit, have found critical differences between Title IX and Title VII that have led them to the far more restrictive "actual notice" standard of liability. *See Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1034 (7th Cir. 1997); *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648, 650 (5th Cir. 1997).

While there are critical differences between Title VII and Title IX, as well as between the school context and the workplace, those differences call, if anything, for a broader standard of liability under Title IX.

A. The language of Title IX, as compared to the language of Title VII, supports broader responsibility of school districts for intentional discrimination by teachers against elementary and secondary students.

Title VII makes it unlawful "for an employer . . . to discriminate against any individual with respect to his . . . conditions . . . of

employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1) (1994). Only discrimination by the "employer" violates Title VII. But the statute defines "employer" to include any "agent" of the employer. 42 U.S.C. § 2000e(b) (1994). The Court in *Meritor* relied upon the statutory language of Title VII, and particularly the reference to "agents," to limit the scope of employer liability for discriminatory acts of employees:

> Congress' decision to define "employer" to include any "agent" of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held liable.

Meritor, 477 U.S. at 72 (citations omitted). The Court concluded that Congress intended rather to refer to agency principles to determine when the employer would be liable for the acts of its agents and when it should not be. *Id.*

But Title IX is not phrased as a prohibition on specific misconduct by the school district and its agents.[6] The text of Title IX creates an affirmative duty on the part of recipients of federal funds to insure a school environment free of discrimination. Thus, Title IX provides that "[n]o person . . . shall, on the basis of sex, be . . . subjected to discrimination under any educational program or activity receiving Federal financial assistance." Title IX does not contain the language on which the Court in *Meritor* relied in

6. The majority in *Smith* neglected this difference, and read Title IX as if it provided, along the lines of Title VII, that "no federally funded educational program or activity shall discriminate against any individual on the basis of sex." *See* 128 F.3d at 1023 ("Title IX prohibits recipients of federal funds for a 'program or activity' from discriminating on the basis of sex, while Title VII prohibits employers from discriminating on the basis of sex."); *id.* at 1027 (Under Title IX, the " 'program or activity' [must] 'cause' the discrimination.").

rejecting a broad imputation of vicarious employer liability for discrimination by any supervisor and other employees. Instead, Title IX reads as a guarantee by the funded entity against discrimination in its educational programs.[7]

Those courts that have adopted an actual notice standard based on the differences between Title VII and Title IX have misunderstood the import of those textual differences. They have focussed exclusively on the lack of "agent" language in Title IX while ignoring the difference in the basic provision. Thus, in justifying its actual notice standard, the Fifth Circuit relied chiefly on the statute's identification of the "educational program or activity" as the responsible entity and its failure to define "program or activity" to include "agents" along the lines of Title VII. *Rosa H.*, 106 F.3d at 654. According to the Fifth Circuit, the omission of any reference to "agents" means that there is no basis for attributing to school districts the acts of individual agents. *Id.* But the court misreads the statute. Title IX does indeed make funded educational programs (here, school districts), and not their individual agents, *responsible* for Title IX violations. But what are they responsible for? Title IX does *not* parallel Title VII in prohibiting school districts from themselves discriminating or "causing" discrimination; it commands that "no person . . . shall, on the basis of sex, be . . . subjected to discrimination under any [federally funded] educational program or activity."[8]

7. The Court has declared that Title IX should be given "a sweep as broad as its language," *North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

8. A majority of a Seventh Circuit panel makes the same mistake in concluding that the absence of any reference to "agents" of the educational institutions means that only intentional discrimination by the institution itself is actionable under Title IX. *Smith v. Metro. Sch. Dist.*, 128 F.3d at 1022-1034. First, the majority ignored the (Cont'd)

We do not contend that Title IX necessarily imposes liability for every discriminatory act by every school employee or student.[9] The question remains, what is discrimination "under any educational program"? The answer cannot be that only discrimination *by* the educational program violates the statute; educational programs, and school districts, act only through individuals, particularly in the realm of harassment. But we concede that the answer cannot be that all discrimination by anyone associated with the educational program, including students, violates the school district's duty and gives rise to liability under the statute. There is thus a need for some limiting principles.

We will propose two such limiting principles, one drawn chiefly from the procedural requirements of the statutory scheme

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(Cont'd)
fact that the *Meritor* Court looked to agency principles as a justification for *limiting* vicarious liability. *See Meritor*, 477 U.S. at 72. Second, and more importantly, the majority erroneously read Title IX as if it provided, along the lines of Title VII, that "no federally funded educational program or activity shall discriminate against any individual on the basis of sex." *See Smith*, 128 F.3d at 1023 ("Title IX prohibits recipients of federal funds for a 'program or activity' from discriminating on the basis of sex, while Title VII prohibits employers from discriminating on the basis of sex."); *id.* at 1027 (Under Title IX, the " 'program or activity' [must] 'cause' the discrimination."). We maintain, as did the dissenting judge in *Smith*, that the very different formulation of Title IX asks simply whether there was discrimination "under" (not "by") the educational program. *See id.* at 1047 (Rovner, J., dissenting).

9. Thus, for example, in *Mary M. v. North Lawrence Community School Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997), the perpetrator of the harassment was a 21-year-old cafeteria worker and the victim was a 13-year-old student over whom he had no authority. The conduct in that case, unlike in this case, could not be said to have arisen "under any educational program or activity" absent further inquiry into the knowledge and actions or inaction of the school district.

and one from agency law. But the appropriateness of these principles must be gauged by the distinct language and purposes of Title IX, given the context in which it operates. At least in the case of intentional discrimination by a teacher or administrator who carries out the "educational program or activity," and who exercises authority over his student victim under that program, the statutory text strongly supports the proposition that such conduct violates the obligations of the funded entity — here, the school district — under Title IX.[10]

B. Distinct features of the primary and secondary school context, not present in the workplace, support broader school district responsibility for teachers' sexual harassment of minor schoolchildren.

The more encompassing responsibility to prevent discrimination than is called for by the language of Title IX is

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10. Contrary to the conclusions of the Fifth and Seventh Circuits, the Spending Clause basis of Title IX poses no barrier to damages. U.S.C.A. Const., Art. 1 § 8 cl. 1. It is true that damages may not be recoverable against funded entities under Spending Clause legislation for unintentional discrimination. *Franklin*, 503 U.S at 74-75. *See also Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 599-600 (1983); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981). From this the Fifth and Seventh Circuits concluded that only intentional discrimination by the funded institution itself (*i.e.*, the failure to act once having actual notice of misconduct) was actionable. *See Rosa H.*, 106 F.3d at 652-53; *Smith*, 128 F.3d. at 1028-33. But the Court in *Franklin* disposed of this very argument in the passage excerpted above, by determining that sexual harassment by a teacher, when attributable to the school district, fulfills the Spending Clause requirement of intentional discrimination and justifies the imposition of damages. 503 U.S. at 74-75. Although the facts in *Franklin* left no doubt of the school district's knowledge of its teacher's misconduct, the Court made no reference to those facts in its analysis of the Spending Clause objection to damages. *Id.* There is simply no reason to believe that this evidence was relevant on the Spending Clause issue.

fully consistent with the more encompassing responsibility and authority that school districts have over primary and secondary school students.[11] In the school environment, the teacher's power is in some ways directly comparable to the supervisor's economic power over a worker. In other ways, however, the teacher's power and the student's vulnerability is far greater than the power of the supervisor and the vulnerability of the employee.

1. First, teachers are invariably older than students, often much older, as in this case. Schoolchildren are typically minors, as to whom the law universally recognizes a limited capacity for judgment, particularly in the context of sexual activity.[12] The teacher's greater age and experience will often allow him to

11. The context of higher education, in which students are typically adults who are presumptively capable as a general matter of consenting to sexual activity and of making decisions for themselves, may raise somewhat different issues than are raised by this case. The higher education context may in fact be more analogous to the workplace than is the context of compulsory primary and secondary education.

12. In Texas, for example, the criminal offense of "Indecency with a Child" is defined as sexual conduct with a child younger than 17 years old, regardless of consent. TEX. PENAL CODE ANN. § 21.1 (West 1994). In referring to state law on this issue, we do not of course imply that the contours of Title IX should vary from state to state; we simply illustrate the general recognition in the law that young teenagers are universally held to be vulnerable to exploitation and to require protection against sexual activity. Unlike the adult employee in the Title VII context, minor schoolchildren are deemed as a matter of law to be incapable of consenting to sex with an adult. Thus, the Seventh Circuit recently held that, in the case of a 13-year old victim, the question of whether sexual contact was "welcome" was legally irrelevant because of her age, and that evidence on that issue was so prejudicial as to require retrial. *Mary M. v. North Lawrence Community School Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997).

manipulate the much younger and immature student entrusted to his tutelage.

2. The vulnerability of young students to manipulation by adults is of particular concern because of the devastating psychological consequences that can flow from sexual abuse at an early age, particularly when it is perpetrated by a trusted and important adult in the child's life.[13]

3. The power of teachers and the vulnerability of students is heightened by the compulsory nature of primary and secondary education. School attendance is compulsory for most of this period. The vast majority of students, especially in the public school system, typically have no choice about the school to which they are assigned and little choice in the teachers to whom they must report. The Court's sexual harassment jurisprudence properly rejects the notion that workplace harassment must be tolerated because employees can escape a hostile environment by changing jobs. But where switching schools, or even switching teachers, is often not even a theoretical possibility, the potential for sexual exploitation is even

13. This point was underscored in a different context in the Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), which concerned the far more innocuous act of a high school boy in giving a lewd campaign speech at a school assembly:

> The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students — indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.

Id. at 683.

greater, and the obligation of school districts to prevent such exploitation should be correspondingly greater.

4. All of these factors converge in the notion that "for many purposes 'school authorities ac[t] *in loco parentis*,' with the power and indeed the duty to 'inculcate the habits and manners of civility.' " *Veronia School District 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986)).[14] In several contexts, the Court has recognized the expansive power and responsibility that attends the *in loco parentis* role of local school districts, including the constriction of constitutional rights that might be claimed by adult citizens against the state, but not by schoolchildren against school officials. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (noting that "a proper educational environment requires close supervision of schoolchildren").

There are numerous examples in the Court's earlier school cases that establish both the dependence of schoolchildren and the correspondingly greater authority and duty of school officials. For example, schools have the power, notwithstanding the First Amendment, to remove books from the school library that are deemed vulgar, *Board of Education v. Pico*, 457 U.S. 853, 871-72 (1982), to punish lewd speech by a high school student in a school assembly, *Fraser*, 478 U.S. at 685, and to censor a high school student newspaper in order to shield young students from inappropriate or disturbing material, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Similarly, school officials have broader powers under the Fourth Amendment to search

14. We recognize that the *in loco parentis* concept is outdated to the extent that it locates the exclusive source of schools' power in the students' parents. *See New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985). But as the cases cited in text show, the concept remains powerful with respect to the power and responsibility of schools to protect and guide students toward maturity and full citizenship.

students' lockers, *T.L.O.*, 469 U.S. at 339, and to test for drugs, *Acton*, 515 U.S. at 665.

While these cases concern the limited constitutional rights of schoolchildren, the reason for those limited rights lies in the correspondingly greater duties that attach to those exercising *in loco parentis* power over dependent minors. As the Court explained in *Fraser*,

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

478 U.S. at 683.

With Title IX, Congress imposed on school districts a statutory obligation, as a condition of receiving federal funding, to protect students under their care and tutelage from sex discrimination, including sexual harassment. The school district's broad responsibility for the conduct of those individuals who carry out the educational programs, and particularly for the conduct of the teacher "role models" to whom the schools commit the care and guidance of their young students, is entirely appropriate. It is justified by the psychological and physical immaturity of minor

students, the potential for psychological manipulation and serious harm at the hands of older, trusted teachers, the compulsory nature of public and secondary education, and the traditionally heightened *in loco parentis* obligations of the schools.

All of these facts are present in this case: the psychological vulnerability of Gebser, the dependence on an adult role model as mentor, the manipulative process of seduction, the capacity of Waldrop to act as gatekeeper to desired educational benefits, and the immaturity that prevented Gebser from knowing how to extricate herself from an abusive situation. These facts fully bear out the uniquely dependent circumstances of schoolchildren. As the Court described in *Franklin*, it is the exploitation of that vulnerability of schoolchildren that stands foursquare within what Congress "sought by statute to proscribe." 503 U.S. at 75.

II.

THE FIFTH CIRCUIT'S ACTUAL NOTICE STANDARD OF LIABILITY, WHICH PARALLELS THAT REJECTED UNDER TITLE VII IN *MERITOR*, SHOULD BE REJECTED AS WELL UNDER TITLE IX.

The "actual notice" standard of the Fifth Circuit derives from a misunderstanding of the statutory language of Title IX as compared to Title VII.[15] Moreover, in light of differences between the workplace and the school, it makes even less sense as a functional matter under Title IX than it did under Title VII. The Court's rejection of an actual notice standard in *Meritor* thus provides further basis for rejecting that standard here.

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15. A secondary basis for the Fifth Circuit's adoption of an actual notice standard, and its rejection of any form of imputed or vicarious liability, lies in its analysis of requirements under the Spending Clause. As we explained above, this conclusion is contrary to *Franklin*'s holding on this very issue. *See supra* n.10; *see also infra* n.21.

Meritor involved an employer with no direct knowledge of unwelcome sexual relations between a supervisor and an employee. The employer protested that it could not be held liable without actual knowledge of the objectionable conduct. Although the Court refrained in *Meritor* from issuing "a definitive rule on employer liability," 477 U.S. at 72, it rejected a defense of lack of actual knowledge in the absence of adequate procedures:

> Petitioner's contention that respondent's failure [to use the grievance procedure and put the employer on actual notice of the harassment] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

477 U.S. at 73.

The Court's rejection of an actual notice standard in *Meritor* is best understood on functional grounds: Employers can best prevent sexual harassment by their agents by putting in place procedures designed to encourage victims of harassment to report misconduct. An actual notice standard that is not conditioned on the availability of procedures will have the predictable but perverse effect of *discouraging* employers from establishing procedures that will put them on notice of their agents' misconduct.

Yet the defense that the Court ruled unacceptable for sexual harassment of adults in the workplace is precisely the actual notice standard adopted by the Fifth Circuit for the sexual harassment of schoolchildren under Title IX. Under the Fifth Circuit standard, as applied in this case:

> [S]chool districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board

> with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Doe v. Lago Vista Independent School District, 106 F.3d 1223, 1226 (5th Cir. 1997), Pet. App. at 15a.

This is the third in a line of cases in which the Fifth Circuit has determined that only actual knowledge, followed by a failure to act, on the part of supervisory personnel with direct authority over the offending teacher will result in district liability; knowledge on the part of "the bulk of employees, such as fellow teachers, coaches, and janitors," is irrelevant "unless the district has assigned them both the duty to supervise the employee who has sexually abused a student and also the power to halt the abuse." *Rosa H.*, 106 F.3d at 660 (5th Cir. 1997). *See also Canutillo Ind. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2434 (1997).

The stringency of the Fifth Circuit's rule is illustrated by the facts in *Leija*, in which the plaintiff, a second grader, complained to her homeroom teacher that a coach was behaving inappropriately toward her; another girl made the same complaint to the same teacher. The teacher did nothing, and reported the complaints to no one, even after the plaintiff's parents also spoke to her about it. Despite evidence that the school district, through publications distributed to students and their parents, specifically instructed that any complaints be routed through students' homeroom teachers, the Fifth Circuit held that the homeroom teacher's knowledge could not be imputed to the school district and that the school district was not liable to the student as a matter of law.

The Fifth Circuit's actual notice standard under Title IX creates all the wrong incentives for school districts, much as it would for

employers under Title VII.[16] If a school district can be liable for only that sexual harassment of which it has actual notice through a managerial official, it is irrational for the district to establish procedures by which it can gain actual notice of misconduct. The sensible course for the liability-conscious school district is to "see-no-evil" and maintain its defense of ignorance against any eventual lawsuit. It is hard to imagine a legal standard that would more completely undermine Title IX.

Nothing in the text, structure, or purpose of Title IX justifies the imposition of a less demanding standard of school district responsibility than the standard of employer liability under Title VII. On the contrary, as we have shown, the distinct features and context of Title IX support broader school district responsibility and liability for the conduct, in particular, of teachers and others granted authority over minor schoolchildren.

It seems beyond cavil that teachers have *at least* the power over their students that supervisors have over employees and that school districts bear *at least* the level of responsibility toward minor students that employers bear toward their employees. As the Second Circuit observed in *Kracunas v. Iona College*, 119 F.3d 80 (2d Cir. 1997), "College students should not receive less protection

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16. It is striking to compare this "actual notice" test for Title IX to the Fifth Circuit's own Title VII caselaw. In *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 106 U.S. 1065 (1987), the Fifth Circuit held that an employer would be liable for a supervisor's sexual harassment of an employee if the employer *knew or should have known* that the harassment was occurring and failed to take adequate remedial measures. *See also Farapella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992). Thus, it is only in the Title IX context that proof of actual knowledge is required of victims of sexual discrimination, despite the obviously greater vulnerability of students to sexual harassment and despite their comparatively inferior power to utilize a complaint system, even if one is in place.

from conduct that is shown to be harassment (as opposed to teaching) than do employees in the workplace." *Id.* at 88. No lesser obligation should be imposed in the case of sexual harassment of minor schoolchildren.

III.

A SCHOOL DISTRICT SHOULD BE LIABLE FOR A TEACHER'S HARASSMENT, WHETHER OR NOT THE SCHOOL DISTRICT HAD NOTICE OF IT, IF THE DISTRICT HAD NOT ADOPTED AND PUBLICIZED ADEQUATE GRIEVANCE PROCEDURES.

At a minimum, the Court should hold districts liable for sexual harassment of which they knew or should have known. But a school district should not be able to claim lack of knowledge, actual or constructive, if it did not have in place reasonable avenues of complaint and redress, as required under longstanding federal regulations. Paraphrasing the Court in *Meritor*, the school district's claim that its lack of knowledge of harassment "should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." 477 U.S. at 73.

A. School Districts have a clearly established legal obligation to maintain and publicize adequate policies and grievance procedures to prevent and curtail harassment.

Long before this case arose, the Department of Education issued a set of implementing regulations. 45 Fed. Reg. 30955 (1980), *codified at* 34 C.F.R. § 106 (1997).[17] These regulations required a school district receiving federal funds: (1) to "designate

17. These regulations were promulgated in 1980 when the Department of Education assumed enforcement of Title IX from the Department of Health, Education, and Welfare.

at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this [regulation]," and to "notify *all* its students and employees of the name, office, address and telephone number" of that employee, 34 C.F.R. § 106.8; (2) to "adopt *and publish* grievance procedures providing for prompt and equitable resolution of student and employee complaints" of discrimination, *id.* (emphasis added); and (3) to notify students, among others, of its policies and protections against discrimination. 34 C.F.R. § 106.9.

The existence of well-publicized grievance procedures is crucial. As the Office of Civil Rights [hereinafter "OCR"] recently explained,

> By having a strong policy against sex discrimination and accessible, effective and fairly applied grievance procedures, a school is telling its students that it does not tolerate sexual harassment and that students can report it without fear of adverse consequences.

DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. 12034, 12040 (1997). It is through these procedures that educational institutions can best carry out their obligations under Title IX to prevent discrimination.

Yet Respondent made no attempt to comply with these requirements. Certainly there was no compliance with the requirement that all affected persons be notified of the existence of a grievance process, for Superintendent Collier could not identify a single attempt to notify any students that such a procedure existed, J.A. 72a-73a, if indeed it actually did exist, and Gebser testified without contradiction that she was never informed of any procedure she could have used to report her teacher's inappropriate comments or conduct. J.A. 63a-65a.

B. A School District that fails to maintain and publicize adequate procedures for dealing with sexual harassment should be liable for harassment regardless of its lack of notice.

The failure to comply with OCR's longstanding procedural requirements should render the school district liable for harassment that might otherwise have been prevented or discovered and curtailed. As OCR explained in issuing its Guidelines:

> [I]n the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile environment, even if the school was not aware of the harassment and failed to remedy it. This is because, without a policy and procedure, a student does not know either of the school's interest in preventing this form of discrimination or how to report harassment so that it can be remedied. Moreover, . . . a school's failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students.

62 Fed. Reg. at 12040 (footnotes omitted). Under this standard, a school district is liable for harassment of which it knew or should have known, *or for which it affords no reasonable avenue for complaint and redress.*[18] In effect, the school's ability to

18. *See Krakunas*, 119 F.3d at 87-88 (adopting this standard as well as the standard derived from RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)(1958)). This standard has also been applied, following *Meritor*, under Title VII, as part of either a "constructive notice" or an "apparent authority" inquiry. In other words, employers may be (Cont'd)

defend against liability for harassment on the basis of its lack of notice, constructive or actual, is conditioned on the existence of adequate procedures for complaining of and responding to harassment.

As the above passage indicates, the OCR standard is supported by agency principles under which a principal is liable for acts committed by the agent with the "apparent authority" of the principal. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). From the perspective of a young adolescent, it is not unreasonable to conclude that, in the absence of any information from the school district defining and condemning sexual harassment, and any direction as to how to complain of sexual harassment, the sexual approaches of a respected teacher with educational and disciplinary authority over the student may be cloaked with "apparent authority," or at least acquiescence, of the school.[19]

(Cont'd)
held to have constructive notice of harassment, or to have created "apparent authority" to engage in harassment, in the absence of adequate grievance procedures and proper publication of the employer's policy and availability of those procedures. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 634 (2d Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 563 (1997) (employer held liable for harassment perpetrated by supervisor if "the employer provided no reasonable avenue for complaint"); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1450 (10th Cir. 1997), *pet. for cert. filed*, No. 97-232 (looking to established procedure as element of determining liability: "the question of whether the employer established and implemented a policy against sexual harassment is an important factor in deciding whether apparent authority [for supervisor harassment] existed").

19. This has been recognized as well in the employment context. The EEOC's Policy Guidance on Current Issues of Sexual Harassment explains,

> [I]in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual

(Cont'd)

But more important than agency principles here is the functional importance of requiring adequate procedures as a condition for a school district's defending on the basis of lack of notice. We have shown that an "actual notice" standard discourages school districts from establishing effective grievance procedures. A school district should not be able, as it is under the Fifth Circuit's narrow construction of Title IX, to insulate itself from liability by insulating itself from knowledge of its own teachers' wrongdoing. But a simple "knew or should have known" standard may create similar incentives. If the question is simply whether school officials had adequate "clues" that harassment may be taking place, the school district may still decide that it is better to do nothing; a grievance procedure may simply bring more clues to its attention.[20]

(Cont'd)

> harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.

EEOC COMPL. MAN. (CCH) ¶ 3114, 3280 (Mar. 19, 1990). These EEOC guidelines are particularly significant because the OCR has long taken the position that EEOC standards of employer liability under Title VII should apply to school districts under Title IX as well. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (citing OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement & Policy Serv., OCR, to Regional Civil Rights Directors (Aug. 31, 1981)).

20. Moreover, a constructive notice standard without the procedural proviso advocated here might permit a district that has no adequate procedures to argue that it would not have known of harassment even *with* adequate procedures because the victim would not have used procedures if they had been in place. This hypothetical inquiry clearly has no place in assessing the liability of a school district that has blatantly failed to comply with the procedural requirements that have long been imposed as a condition of receiving federal funds.

It is fully consistent with the text and purpose of Title IX to impose liability, on behalf of a student who has been "subjected to discrimination" under a school district's programs, on the basis of the school district's failure to institute adequate procedures for preventing and uncovering sexual harassment under its programs.

Moreover, under no principle of statutory construction may a school district accept federal monies with specific requirements for internal procedures and notification of students, and then simply disregard those requirements while continuing to receive the underlying grants. This is no more than a simple contractual requirement that the conditions of the grant be complied with. When an individual is subjected to discrimination under a program that has failed to comply with these straightforward and clearly established procedural conditions, and harm results, the school district should be held liable.[21]

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21. A school district that has failed to comply with these long-established and clearly-applicable procedural requirements has acted "intentionally" within the meaning of Spending Clause requirements; those requirements would thus be met here even if *Franklin* did not clearly establish that the intentional actions of the teacher perpetrator fulfilled the requirement of intentional discrimination for liability under Spending Clause legislation, *see supra* n.15. Liability based on the failure to comply with these clearly established legal requirements is not based on mere negligence, as the Seventh Circuit in *Smith* characterized the imposition of liability under a "knew or should have known" standard. *Smith*, 128 F.3d at 1028-29.

IV.

SCHOOL DISTRICTS SHOULD BE LIABLE UNDER TITLE IX FOR SEXUAL HARASSMENT BY A TEACHER WHO IS AIDED IN CARRYING OUT THE HARASSMENT BY HIS OR HER POSITION OF AUTHORITY OVER THE STUDENT/VICTIM.

Title IX does not contain the "agency" language on which the Court relied in *Meritor* to reject vicarious liability for all supervisory harassment. 477 U.S. at 72.[22] But that cannot mean that school districts are responsible for *no* acts of individual agents, for school districts can act at all only through individuals.[23] On the contrary, the language of Title IX, as well as the unique context in which it operates, support a broad conception of school district responsibility for discrimination under its educational programs. But it is also unlikely that Congress intended to make school districts vicariously liable for all acts of discrimination or harassment by any of its

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22. *Franklin* implies — though the issue of vicarious liability was admittedly not presented — that schools are directly accountable for intentional discrimination by teachers, in that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe," that is, a teacher's sexual harassment and abuse of a student. 503 U.S. at 75.

23. There is thus a certain disingenuousness in the decisions, like *Rosa H.* and *Smith*, that have adopted an "actual notice" standard because of the purported inapplicability of agency principles. For they still must answer the question, "actual notice to whom?" And they must still identify some class of school district agents whose knowledge and subsequent inaction are relevent. Those decisions rest essentially not on a rejection of liability for the acts of "agents" but on an extremely restricted conception of which agents' knowledge and acts will be deemed acts of the school district. *See, e.g., Rosa H.*, 106 F.3d at 659. That conception is inconsistent with both the language and the purposes of Title IX.

employees or students. We agree that some limiting principles are called for.

A number of courts have adapted from Title VII caselaw the "known or should have known" standard of liability, often called "constructive notice."[24] At a minimum, it is certainly appropriate to hold school districts liable for discriminatory harassment of which their managing agents knew or should have known. But this standard, even with the procedural proviso proposed above in Part III, is not necessarily adequate to address the problem of teachers who abuse their authority over students to lure them into sexual activity. Like Waldrop, the teacher will nearly always endeavor to keep the illicit activity secret, and to induce the student to maintain the secrecy.

As between the school district that put the teacher in the position of extracting sexual gratification through abuse of his authority and the student who is thus abused, the school district should bear the cost of this abuse, and should be given the greatest encouragement to devise ways to prevent and curtail harassment by screening and training employees and by uncovering misconduct at an early stage through adequate grievance procedures.

Particularly in the context of sexual predation against elementary and secondary school students, the standard of school district liability should directly address the problem of abuse of authority.

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24. *See, e.g., Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), *petition for cert. pending*, No. 97-906 (applying this standard to co-worker harassment); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (same). Following the Court's pointed statements in *Meritor*, 477 U.S. at 73, what employers "should have known" depends in part on whether they maintained adequate procedures for encouraging victims of harassment to come forward with complaints. *See supra* n.18.

A. Well-established principles of agency law support holding school districts vicariously liable for sexual harassment by teachers where the teacher was aided in carrying out the harassment by his position of authority in the institution.

Under agency principles, the principal is liable for torts committed by its agent outside the scope of employment (as is invariably the case with sexual harassment) where the agent "was aided in accomplishing the tort by the existence of the agency relation." RESTATEMENT (SECOND) OF AGENCY, § 219(2)(d) (1958). As adapted by the Department of Education to the context of sexual harassment, the school district should be liable for teacher harassment where the teacher "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. at 12039 (1997).[25]

A number of courts have turned to § 219(2)(d) as a basis for liability under Title IX for sexual abuse by teachers. This was the basis of the holding of the Second Circuit in *Kracunas*:

> [I]f a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the professor's conduct.

119 F.3d at 88. *See also Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (1996); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426-27 (N.D. Cal. 1996); *Hastings v. Hancock*, 842 F. Supp. 1315, 1319-20 (D. Kan. 1993).

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25. We argue below that the Department of Education's interpretation of the statute is itself entitled to some deference.

While Title IX does not direct courts to look to principles of agency law, it certainly does not foreclose reference to agency principles that are fully consistent with the language and purposes of Title IX. The imposition of vicarious liability for teacher harassment is thus not *based* upon agency law, even in the limited sense in which employer liability under Title VII is based upon agency law under *Meritor*.[26] Vicarious liability is based upon the distinct language and purposes of Title IX. But the agency principle embodied in § 219(2)(d) helps to define the scope of vicarious liability in a way that is consistent with Title IX's language and purpose.

Thus, for example, this application of agency principles would recognize an appropriate distinction between the acts of teachers, coaches, administrators, and others who exercise authority over students, on the one hand, and the acts of custodial or clerical workers and of students, who do not normally exercise such authority, on the other hand.[27] The former are normally "aided in carrying out the sexual harassment" by their position of authority; the latter are normally not.[28] Harassment by the former, where it is

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26. The Court in *Meritor* "agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area," but recognized that "such common law principles may not be transferable in all their particulars to Title VII." 477 U.S. at 72.

27. As an example of the latter type of case, *see Mary M. v. North Lawrence Community Sch. Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997), in which a 21-year-old cafeteria worker harassed a 13-year-old student over whom he had no authority. The conduct in that case, unlike in this case, could not be presumed to have arisen "under any educational program or activity" absent further inquiry into the knowledge and actions or inaction of the school district.

28. We do not dispute the suggestion of OCR that, for young

(Cont'd)

facilitated by their authority over students, is fairly regarded as "discrimination . . . under the educational program," and should give rise to liability. School district liability for harassment by the latter would depend on further inquiry into the knowledge and action or inaction of more responsible school officials.

In this case, there is little doubt that Waldrop was "aided in carrying out the sexual harassment" by his position of authority. Waldrop's careful cultivation of a relationship with Gebser could only have occurred because he was her trusted teacher and mentor, positions of power that he gained from Respondent. His continued contact with her in that role, beginning when she was in middle school and continuing over the following two years, allowed him steadily to escalate his psychological manipulation until it culminated in sexual contact and intercourse. His pretextual visit to her house occurred in the guise of carrying out his teaching duties. His unmonitored one-on-one relationship with her over the following summer, under the cloak of a summer school course for one, created the opportunity for regular sexual contact. If it were not for the trust engendered by the student-teacher relationship, Gebser would in all likelihood have recognized the inappropriateness of his early comments, prior to their escalation to illicit sexual activity. As it was, however, he was the person within the school district she most relied on, and she wanted him to continue as her teacher and mentor, so she did not resist him even after she recognized that his actions were wrong.

(Cont'd)
elementary school students, any adult working at the school may appear to act with the authority of the school. SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. 12039 (1997). Whether an employee was "aided in carrying out the sexual harassment . . . by his or her position of authority" or acted with "apparent authority" are factual questions, the answers to which will depend on a variety of circumstances, including the age and maturity of the victim.

B. It is consistent with the longstanding position of the Department of Education to hold school districts liable for harassment by teachers who were "aided in carrying out the harassment of students by his or her position of authority."

As noted above, the Department of Education's Office of Civil Rights has concluded that a school district is liable for harassment by its employee, among other circumstances, if the employee "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." Department of Education, Office of Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12039 (1997).[29] The OCR's interpretation of the scope of school district liability for sexual harassment is a refinement of the position taken by the agency since 1981, when OCR declared that EEOC standards of employer liability under Title VII were applicable to educational institutions under Title IX as well.[30] The EEOC has long taken the position that employers are broadly liable

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29. The Department of Education is the agency with responsibility for administering Title IX. That agency and its predecessor, the Department of Health, Education, and Welfare, were charged with interpreting and implementing the rights protected by Title IX. 20 U.S.C. § 1682 (1994). *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522, n.12; *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1996). By contrast, Title VII does not give to the EEOC comparable powers of interpretation and implementation. *See Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (noting limited authority of EEOC to promulgate rules and regulations under Title VII).

30. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (1988) (citing OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement & Policy Serv., OCR, to Regional Civil Rights Directors (Aug. 31, 1981)).

for harassment by supervisors who were aided in carrying out the harassment by their supervisory authority.[31]

The Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *See also Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006, 1015 n.20 (5th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 165 (1996) ("When interpreting Title IX we accord the OCR's interpretations appreciable deference.")[32] Moreover, as we have explained, the OCR's interpretation of Title IX and the scope of school district liability, and particularly its imposition of liability for the acts of those who are aided in carrying out harassment by the authority granted over students, is reasonable and fully consistent with the language and the purpose of the statute.

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31. At the time of *Meritor*, the EEOC's regulations provided for employer liability for all acts of its agents. 29 C.F.R. § 1604.11(c) (1985) (cited in *Meritor*, 477 U.S. at 71). Subsequently the EEOC issued its own *Policy Guidance on Current Issues of Sexual Harassment* adopting agency principles and recognizing that "[a] supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer." EEOC COMPL. MAN. (CCH) ¶ 3114, 3280 (Mar. 19, 1990).

32. The Fifth Circuit in *Rosa H.* refused to defer to the 1997 OCR Guidance on the ground that application of the policy to cases arising before 1997 would be "retroactive." 106 F.3d at 658. But this characterization fails to reckon with OCR's longstanding interpretation of the statute as calling for the application of principles of agency and vicarious liability in determining the liability of school districts for the acts of agents. *See supra* pp. 38-39.

CONCLUSION

For the reasons set forth above, Petitioners urge the Court to reverse the decision of the Fifth Circuit.

Respectfully submitted,

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No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether a school district that receives federal funds can be held liable under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, for hostile environment sexual abuse of a student by a teacher when the school district had neither actual nor constructive knowledge of that abuse.

TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

United States Constitution Cited:

Other Authorities Cited:

Contents

Respondent Lago Vista Independent School District respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The opinion of the Fifth Circuit is reported at 106 F.3d 1223 (5th Cir.), *cert. granted*, 118 S. Ct. 595 (1997) (No. 96-1866).

PERTINENT STATUTES

1. Title IX.

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C.A. § 1681(a) (West 1990) (hereinafter referred to as Title IX).

2. Title VI.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d (West 1994) (hereinafter referred to as Title VI).

3. Title VII.

> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

42 U.S.C.A. § 2000e-2(a)(1) (West 1994) (hereinafter referred to as Title VII).

STATEMENT OF THE CASE

A. Statement of Facts.

Alida Star Gebser was a student in the Lago Vista Independent School District in Travis County, Texas. (R. 346.) Lago Vista is a small school district near Austin, Texas with contiguous middle school and high school campuses. (R. 346.) The district receives federal funding for cafeteria food, special-education and drug-free school programs. (R. 372.)

Gebser first entered the district as a seventh grade student. (R. 346.) She was quickly integrated into classes reserved for the gifted and talented. (R. 346.) By the time she reached the eighth grade, she began participating in high-school level academic activities. It was in that context that she first met Frank Waldrop, who led a "great books" discussion group for high school students. (J.A. 51a.) Gebser joined that discussion group while still in the eighth grade because Waldrop and his wife (also a teacher in the district) believed she would advance faster at a higher grade level. (J.A. 51a.) Waldrop's conduct at that time gave no hint of his subsequent abhorrent behavior. (R. 346.)

In the fall of 1991, Gebser enrolled in a social studies class and had Waldrop as her teacher. (R. 347.) Gebser testified that Waldrop treated students as if they were adults, but never made blatantly sexual or otherwise offensive remarks. (R. 347-49.) During Gebser's second semester, Waldrop's interaction with her became increasingly familiar. He flattered her with suggestions that she was more mature than other students; he began to make subtle

remarks — often tied to a literary reference — which were implicitly sexual. (J.A. 53a.) Gebser was not offended by Waldrop's behavior because she appreciated being treated as his "peer." (R. 350.)

Having apparently won Gebser's trust during the first semester, Waldrop exploited the situation in the second. Just prior to spring break of Gebser's freshman year, Waldrop drove to Gebser's home. Finding her alone, Waldrop kissed her, fondled her breasts and genitals, and told her he loved her. (J.A. 54a-55a.) Gebser had no doubt at the time that Waldrop's conduct was wrong. (J.A. 55a-56a.) Even though she knew that Waldrop was scheduled to leave the country immediately on a two-week long school field trip, (R. 351), Gebser did not report the incident to anyone — not to her parents, not to the police, and not to anyone associated with the school district (J.A. 56a.) Her only reason for not discussing the incident with the school's guidance counselor was her "perception" that the counselor was busy with tests and schedules. (R. 355.)

During the period that Waldrop was out of the country, Gebser purposefully rebuffed the inquiries of a concerned teacher who noticed that she seemed "out of sorts." (R. 354-55.) Gebser acknowledged to the teacher that something was "very wrong" but she refused to discuss it. (R. 355.) She made it clear to the teacher that she did not want to talk to *anyone* about what was bothering her and the teacher respected her wishes. (R. 355.) The one person in whom she did confide (a fellow high school student) instructed her to terminate the relationship. (R. 352.) Gebser swore that student to secrecy. (R. 352.) Gebser knew Waldrop's advance was inappropriate and that any such relationship between teacher and student was wrong. (J.A. 55a.) She also knew that if she reported the relationship to school officials, it would end immediately. (J.A. 63a.) She did not report the relationship.

Waldrop's exploitation progressed rapidly after he returned from Europe. He and Gebser began having sexual intercourse in the spring of 1992. (J.A. 59a-60a.) In the beginning their interaction was infrequent, but over the next ten months they began an

increasingly regular pattern of secret, off-campus liaisons. (J.A. 60a-61a.) In order to conceal the relationship from students, faculty, and administrators at Lago Vista, Waldrop and Gebser developed a code for arranging covert sexual encounters off campus. (J.A. 61a.) Gebser agreed to conceal the affair because she knew that she would no longer have Waldrop as a teacher if the relationship were exposed. (J.A. 62a.) She was confused and bewildered because her sexual relationship with Waldrop differed so dramatically from others she had with boys closer to her own age. (R. 360-361.)

Gebser's relationship with Waldrop continued until the two were discovered together in January 1993, at which time Waldrop was arrested. (*See* J.A. 11a, 59a, 83a.) Lago Vista terminated his contract and the Texas Education Agency revoked his license to teach. (R. 377.) From the date of his arrest, he was never again allowed in a Lago Vista classroom. (R. 396.)

None of the sexual activity (or any other physical contact) between Gebser and Waldrop occurred on Lago Vista's property. (J.A. 59a.) Gebser did not inform any teacher or administrator of Waldrop's inappropriate behavior, nor was the relationship known or suspected among the students or staff at Lago Vista. (R. 352-53.)

Although Gebser contends that the district was on notice of Waldrop's "inappropriate sexual approaches" toward other students, the record does not support that assertion. The only prior complaint in the record concerned comments Waldrop supposedly made in the fall of 1992. (J.A. 76a.) In October, the parents of two of Waldrop's students complained to the principal that Waldrop had made inappropriate remarks in class. (J.A. 77a.) Those remarks included the observation that some of the girls had "filled out" over the summer and an obscure reference to the size of some of the boys' belt buckles. (J.A. 77a.) The principal, Michael Riggs, promptly investigated the complaint and set up a meeting between Waldrop and the parents. (J.A. 78a.) Waldrop stated at that meeting

that he had not meant to offend anyone but apologized if he had. (R. 393.) At the end of the conference, it appeared to Riggs that the parents were satisfied and the situation had been resolved. (R. 395.) He did not believe that Waldrop would make any further inappropriate remarks and, to be sure, he admonished Waldrop to be more careful about his comments in the future. (J.A. 80a.) Riggs did not receive any further complaints.[1]

During at least a portion of the period in which Waldrop was engaging in sexual conduct with Gebser, Lago Vista had in place written policies prohibiting any employee from sexually harassing a student. (J.A. 43a-47a.) "Sexual harassment" was defined as including:

> such activities as engaging in sexually oriented conversations, telephoning students at home or elsewhere to solicit unwelcome social relationships, physical contact that would reasonably be construed as sexual in nature, and threatening or enticing students to engage in sexual behavior in exchange for grades or other school-related benefit.

(J.A. 46a.) Another policy, in place from at least 1989 through 1993, more generally prohibited school district employees from engaging in any sexual harassment, whether of a student or fellow employee. (R. 380, 415, 419.)

Moreover, at the time of the events here at issue, Lago Vista had a written complaint policy that provided that "[a] student or parent who has a complaint alleging sexual harassment or offensive intimidating conduct of a sexual nature may request a conference with the principal or designee." (J.A. 46a.) The principal or designee was then required to hold a conference within five days and to coordinate an investigation which was to be completed within ten

1. There was also no flood of complaints after Waldrop's relationship with Gebser was revealed. (R. 376.) The district followed up on the few reports that were made and found nothing of concern. (R. 376.)

days. (J.A. 46a.) This procedure was not followed in the present case because neither Gebser nor her parents made any complaint about Waldrop's conduct.[2] (R. 380.)

In addition to these policies, every teacher in the district was (and is) governed by an ethical code of conduct, which requires professional educators to make reasonable efforts to protect students from conditions detrimental to the physical or mental health and safety of the students. (R. 374.) That requirement stands as an absolute bar to the sort of abuse inflicted upon Gebser by Waldrop. No school with notice of such a relationship would tolerate it. Had Lago Vista actually been apprised of the abuse, it would have investigated immediately, suspended Waldrop and, ultimately, terminated his contract. (R. 381.) As noted above, however, Waldrop and Gebser managed to conceal the relationship until January of 1993. (R. 381.)

B. Proceedings Below.

The United States District Court for the Western District of Texas rejected Gebser's contention that Lago Vista should be held strictly liable for Waldrop's conduct because such a holding would not further Title IX's purpose of countering *policies* of discrimination in federally funded education programs. (R. 544-45.) The court concluded instead that:

> to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff.

2. Gebser's parents did not condone Waldrop's conduct; they were simply unaware of it because Gebser concealed the relationship from them, as well as from school officials. (R. 382.)

(R. 545.) Because there is no evidence in the present case that Lago Vista had actual or constructive notice of Waldrop's sexually discriminatory behavior, the court granted Lago Vista's motion for summary judgment on Gebser's Title IX claim.[3] (R. 547.)

The United States Court of Appeals for the Fifth Circuit affirmed the order of the district court in accordance with its recent opinions in *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648 (5th Cir. 1997), and *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997). The court reiterated its position that Title IX does not impose strict liability on a school district for sexual harassment of a student by a teacher. *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997). It also rejected a theory of common-law agency, noting that such a theory "would generate vicarious liability in virtually every case of teacher-student harassment." *Id.* at 1226. The court concluded, as it had in *Rosa H.*, that:

> school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Id. There is no evidence in this case that any employee of Lago Vista with supervisory power over Waldrop (or any employee at all) had actual knowledge of his abuse of Gebser.

SUMMARY OF THE ARGUMENT

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court recognized an implied private cause of action under Title

3. The district court also granted summary judgment on Gebser's claims for negligence and violation of § 1983, but Gebser appealed only from the ruling denying her Title IX claim.

IX. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), it recognized a remedy in damages for an intentional violation of that statute. In neither case did the Court address the standard by which a school district may be held liable under Title IX when a teacher sexually harasses a student. Lago Vista proposes that the only appropriate standard that may be applied in these circumstances is one requiring actual knowledge of a substantial risk of sexual harassment on the part of a school official who was invested by the school board with the duty to supervise the offending employee and the power to take action to end the abuse and who failed to take appropriate remedial action.

An actual knowledge standard is required because the language and history of Title IX reveal that Congress intended that it be interpreted in the same manner as Title VI. Both Title VI and Title IX are Spending Clause legislation, which limits the circumstances under which a recipient of federal funds may be held liable for damages. Specifically, a recipient of federal funds must be given clear notice of the consequences of accepting those funds, including clear notice of the circumstances in which it may be exposed to monetary liability. As previously recognized by the Court in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), liability for damages may only be imposed under Title VI for an intentional violation of the statute. School districts accepting federal funds after the date of that opinion were entitled to expect that the same limitation would apply to Title IX. Nothing in the statute, its implementing regulations, or its interpretation by the Department of Education gave any notice to the contrary. The fact that the Department of Education, through its Office for Civil Rights, has now issued a Guidance purporting to define Title IX standards of liability is of no moment. That Guidance, even if it were entitled to any deference, was issued four years after the events here at issue and cannot be given retroactive effect.

Title IX's similarity to Title VI and its Spending Clause roots are central to a complete analysis of the question presented to this Court and are discussed in detail below. Gebser, however, has failed

to confront these issues; she makes no mention at all of Title VI and relegates her abridged discussion of the Spending Clause to two footnotes. *See* Brief for Petitioners at 19 n.10 & 24 n.15. She relies, instead, on an application of Title VII standards and principles of agency law. This reliance is unfounded.

The language and source of Title VII are significantly different than Title IX. For instance, Title VII explicitly refers to "agents," while Title IX does not; Title VII contains an elaborate enforcement mechanism, while Title IX does not; Title VII contains explicit limitations on potential damage awards, while Title IX does not. Most importantly, Title VII is not Spending Clause legislation and is not subject to the limitation that damages may be imposed only for an intentional violation.

Agency principles, as applied by Gebser, would result in strict liability for school districts. Gebser concludes that a teacher is "aided by the agency relationship" in engaging in sexual harassment by mere proximity and access to a student. Adopting such a standard would defeat the purpose of Title IX by inducing school districts to decline federal funds rather than face devastating financial consequence for concealed acts of sexual exploitation.

It is important to bear in mind that the question in this case is not whether school districts are somehow "responsible" for violations of Title IX and for failure to comply with administrative procedures. The issue is in what circumstances a school district may be compelled to answer *in damages* for a violation of Title IX or its implementing regulations. The answer to this question requires careful consideration of the practical impact each proposed standard of liability will have on the goals of Title IX and on the ability of school districts to perform their educational function. The only standard that will allow school districts to concentrate their time, efforts, and resources on education and will not either impose an oppressive financial burden or cause school districts to completely withdraw from federal programs is the standard proposed by Lago Vista — actual knowledge.

Finally, shortly after the Court recognized an implied private cause of action under Title IX, it reinterpreted the *Cort v. Ash*[4] factors previously used to determine when a private cause of action is implicit in a statute. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979). It embraced a "stricter standard for the implication of private causes of action" and declared that the "ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 578. It may be "too late in the day" to reconsider the Court's holdings in *Cannon* and *Franklin*, *see* 503 U.S. at 77 (Scalia, J., concurring in judgment), but it is not too late to refine those holdings to remove from educational institutions receiving federal funds the onerous burden of potential financial ruin arising from conduct it did not know about and could not have stopped.

ARGUMENT

I. GEBSER'S RELIANCE ON TITLE VII IS MISPLACED; TITLE VI IS THE MOST APPROPRIATE ANALOGUE TO TITLE IX.

Much of Gebser's argument rests on the assumption that the interpretation of Title IX should be governed by Title VII principles.[5] Indeed, she states that the comparison between these two statutes is "crucial." Brief for Petitioners at 11. An examination of the language, history, and source of Title IX, however, reveals that the more proper comparison is with Title VI, not Title VII.

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4. 422 U.S. 66 (1975).

5. The principles governing Title VII are not clear. The question of defining the standard of liability for an employer when a supervisor sexually harasses a subordinate employee is currently pending before this Court. *See Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997).

A. Congress explicitly patterned Title IX after Title VI.

This Court has repeatedly recognized that Congress patterned Title IX after Title VI. *Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 514 (1982); *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). This is evident both in the language of the statutes and in the legislative history of Title IX.

1. The language of the statutes.

a. The applicability of Titles VI and IX is contingent on receipt of federal funds; the applicability of Title VII is not.

The language of Title IX is nearly identical to the language of Title VI. Title IX states, in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C.A. § 1681(a) (West 1990). Similarly, Title VI states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C.A. § 2000d (West 1994).

The only differences between the language of Title IX and the language of Title VI are: (1) Title IX applies to discrimination on the basis of sex, while Title VI applies to discrimination on the

ground of race, color, or national origin; and (2) Title IX applies only to education programs or activities receiving federal funds, while Title VI applies to any program or activity receiving federal funds.

The language of Title VII is unlike either Title VI or Title IX. Title VII states, in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

42 U.S.C.A. § 2000e-2(a)(1) (West 1994).

The quoted portion of Title VII differs from both Title VI and Title IX in many respects. For purposes of this case, the most significant distinction is that the application of Title VII is not contingent on the receipt of federal funds. Rather, that statute unconditionally prohibits discrimination in employment; employers are not given any option but to comply. The prohibition contained in Titles VI and IX, however, applies only to recipients of federal funds. As discussed below, potential fund recipients are given the option to decline federal financial assistance and thereby avoid the conditions imposed by Titles VI and IX.

Gebser argues that the language of Title IX (and, by implication, Title VI) does not prohibit discrimination *by* recipients of federal funds. Rather, it prohibits any discrimination *under* a federally-funded program or activity, regardless of whether the fund recipient actually participates in or knows about the discrimination.

Gebser contends that this difference between Title IX and Title VII leads to the conclusion that Title IX must impose *broader*

responsibilities on school districts than Title VII imposes on employers. She first asserts that Title VII simply prohibits discrimination by employers while Title IX "creates an affirmative duty on the part of recipients of federal funds to insure a school environment free of discrimination." Brief for Petitioners at 16. From this, she concludes that school districts are "responsible" for violations of Title IX occurring under any federally funded educational program or activity, whether or not the district "caused" the discrimination. Gebser's argument reaches too far.

Regardless of the merits of Gebser's argument that Title IX requires recipients of federal funds to "guarantee" that there will be no discrimination in their educational programs — which is, of course, an impossible burden and one that Congress could not have intended — the contention that the fund recipient is "responsible" for violations of the statute does not necessarily mean that it is liable to respond *in damages*. If hostile environment discrimination is occurring in one of the district's educational programs or activities, even without any knowledge on the part of the district, the district could certainly be held "responsible" in the sense that it could be ordered to remedy the situation by firing the offending teacher, adopting new policies, enforcing existing policies, or taking other appropriate remedial action. But the availability of such injunctive relief does not necessarily translate into the availability of a remedy in damages.

In sum, the manner in which Title IX is phrased simply determines that a violation of the statute may occur whenever a person is discriminated against on the basis of sex, regardless of the school district's knowledge of the discrimination. But nothing in the language of the statute indicates that a school district must respond in damages for every such violation, regardless of its own knowledge or culpability.

b. Title VII makes specific reference to agency principles; Title IX does not.

As noted above, Title VII applies to an "employer" regardless of whether the employer is a recipient of federal funds. The statute specifically defines "employer" as including any "agent" of the employer. 42 U.S.C.A. § 2000e(b) (West 1994). Title IX, on the other hand, defines the relevant entity — the education program or activity receiving federal funds — as "all of the operations of . . . a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system; . . ." 20 U.S.C.A. § 1687(2)(B) (West Supp. 1997). "Local educational agency" is defined, in turn, as

> a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

20 U.S.C.A. § 8801(18)(A) (West Supp. Pamphlet 1997). The phrase includes any other public institution or agency having administrative control and direction of a public elementary or secondary school. 20 U.S.C.A. § 8801(18)(B) (West Supp. Pamphlet 1997). No reference is made to "agents."

Again, Gebser argues that this difference in language means that school districts shoulder broader responsibilities under Title IX than those imposed on employers under Title VII. Gebser urges that Title VII's express reference to "agents" acts as a limitation on the scope of employer liability. She relies for this proposition on *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), in which the Court stated:

> Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

Id. at 72 (citation omitted).

Interpreting the above-quoted language to support a broader standard of liability under Title IX is flawed in two respects. First, the Court's statement in *Meritor* is

> but another way of stating the obvious; that is, when applying agency principles in the context of Title VII, an employer may only be held liable for the sexually harassing conduct of an employee who acts within the scope of his or her employment.

Smith v. Metropolitan Sch. Dist., 128 F.3d 1014, 1037 (7th Cir. 1997) (Coffey, J., concurring).

Second, the Court in *Meritor* held that, because of the use of the term "agents," the absence of notice does not necessarily insulate an employer from liability. Applying Gebser's reasoning, the *absence* of the term "agents" from Title IX would lead to the conclusion that educational institutions are *not* liable in the absence of notice of sexual harassment. *Id.* Gebser does not confront this analysis because it is not in keeping with her assertion that the lack of reference to "agents" in Title IX somehow creates *broader* liability under that statute than under Title VII.

Finally, despite Gebser's assertion to the contrary, the *Meritor* court was not "rejecting a broad imputation of vicarious employer liability for discrimination by any supervisor and other employees." Brief for Petitioners at 16-17. In fact, only the liability of a supervisor was at issue in that case; there was no intimation of discrimination by any "other employees." The Court was not considering whether an employer is vicariously liable for discrimination committed by employees of any level, but whether the mere fact that a perpetrator is a supervisor is sufficient to impose liability on the employer. It was in that context that the Court concluded that "Congress wanted courts to look to agency principles for guidance" in determining employer liability under Title VII. *Meritor*, 477 U.S. at 72. The failure to include a similar reference to "agents" in Title IX simply means that Congress did not express a desire in that statute to have the courts look to agency principles to determine liability. It cannot be construed to mean that Congress intended that recipients of federal funds be vicariously liable under Title IX for any discriminatory conduct by any employee.

c. Title VII contains elaborate provisions for imposing and limiting monetary liability; Title IX does not.

Title VII and Title IX also differ in that Title VII provides a specific mechanism for redress of violations whereas Title IX provides only for termination of federal funds.[6] Compare 42 U.S.C.A. § 2000e-5 (West 1994) and 20 U.S.C.A. § 1682 (West 1990). This distinction has not gone unnoticed:

> Title VII is a comprehensive antidiscrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal-court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available

6. Title IX regulations specifically adopt and incorporate the procedural provisions applicable to Title VI. 34 C.F.R. § 106.71.

> unless discriminatory conduct falls within one of several exceptions. This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination. . . . And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.

North Haven Bd. of Ed., 456 U.S. at 1934 (Powell, J., dissenting, joined by Burger, C.J. and Rehnquist, J.).

Title VII also is supplemented by detailed regulations that assist employers to avoid illegal employment practices. *Rosa H.*, 106 F.3d at 657 (citing 29 C.F.R. Pts. 1600-1691). In contrast, the regulations promulgated under Title IX do not address sexual harassment at all. Id. (citing 34 C.F.R. §§ 106.1-106.71 and 34 C.F.R. §§ 100.6-100.11). Most significant, however, is the fact that, unlike Title IX, Title VII "establishes limits on liability to ensure that private actions against employers do not become excessive." *Rosa H.*, 106 F.3d at 656 (citing 42 U.S.C. § 1981a). Without these procedural safeguards in place, it is incomprehensible that Congress intended, or that school districts were adequately informed, that in return for limited federal funding, school districts would be exposed to unlimited liability in damages for conduct of which they had no knowledge.

2. Legislative history of Title IX.

It is also apparent from the legislative history of Title IX that Congress intended for that statute to be construed in accordance with Title VI. *See Cannon*, 441 U.S. at 694-701; *North Haven Bd. of Ed.*, 456 U.S. at 546 (Powell, J., dissenting). For example, Senator Birch Bayh, the Senate sponsor of Title IX, repeatedly and specifically connected Title IX and Title VI: "This is identical language, specifically taken from title VI of the 1964 Civil Rights Act. . . ." 117 Cong. Rec. 30407 (1971); "We are only adding the 3-letter word 'sex' to existing law." *Id.* at 30408;

> The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX].

Id.; "[E]nforcement of [Title IX] will draw heavily on [Civil Rights Act of 1964] precedents." 118 Cong. Rec. 18437 (1972). The expectation of Congress in passing Title IX was that it would be construed and applied in the same manner as Title VI.

The few references to Title VII that are contained in the legislative history of Title IX do not support the conclusion that Congress intended for Title IX to be construed like Title VII rather than Title VI. For example, the House Report states:

> One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964. . . . Title VII, however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.

H.R. Rep. No. 554, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2462, 2512. Such references, however, do not negate the overwhelming connection, in language, history, and source, between Title IX and Title VI. At most, one might argue that they support applying Title VII principles to Title IX claims arising in the context of *employment* discrimination. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (application of Title VII standard to Title IX sex discrimination is limited to context of employment discrimination). Because sexual harassment of a student by a teacher does not involve employment discrimination, the legislative history of Title IX does not support the application of Title VII principles in this case.

Finally, it should be noted that Title IX's legislative history is of limited assistance in determining the appropriate standard of liability when a teacher sexually harasses a student. It is apparent from the legislative history that this is not the type of discrimination that was envisioned by Congress at the time Title IX was enacted. There are repeated references to discrimination in admissions, scholarships, availability of services, and employment, *see, e.g.*, 118 Cong. Rec. 5803, 5812 (1972), but no discussion at all of sexual harassment. The Court should be wary of imposing an expansive standard of liability for conduct that Congress did not even contemplate. Indeed, this circumstance supports imposition of the standard of liability most narrowly suited to fulfill the congressional purpose in enacting Title IX — a standard requiring actual knowledge.

B. Title IX and Title VI are Spending Clause legislation; Title VII is not.

Title VII was enacted pursuant to Congress' power under the Commerce Clause and section 5 of the Fourteenth Amendment. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 367 (1978). Title VI, however, was enacted pursuant to Congress' spending power. *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 598-99 (1983); *see* U.S. Const. Art. I, § 8, cl. 1.

The Court in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), declined to address whether Title IX was enacted solely pursuant to Congress' Spending Clause powers or also pursuant to section 5 of the Fourteenth Amendment. It was not necessary to reach this issue in *Franklin* because the Court held that "a money damages remedy is available under Title IX for an *intentional* violation irrespective of the constitutional source of Congress' power to enact the statute. . . ." *Id.* at 75 n.8 (emphasis added). The issue is ripe for decision in this case, though, because there is no evidence that Lago Vista committed an intentional violation of Title IX. Thus, a determination that Title IX was enacted pursuant to the Spending Clause is dispositive of this case.

Title IX *is* Spending Clause legislation. Several factors point to this conclusion. First, as noted above, Title VI has been held to be Spending Clause legislation and the language of Title IX and Title VI is nearly identical. Second, Title IX regulates purely private educational institutions that receive federal funds. If Congress had acted under its Fourteenth Amendment enforcement power, the reach of Title IX would be limited to state actors, *i.e.*, institutions that receive state funds. *See Davis v. Monroe County Bd. of Ed.*, 120 F.3d 1390, 1398 n.12 (11th Cir. 1997), *petition for cert. filed* 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843); *Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1012 n.14 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996). Third, the legislative history of Title IX demonstrates that Congress intended that statute to be a "typical 'contractual' spending-power provision." *Davis*, 120 F.3d at 1398.[7]

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7. The *Davis* court cited the following excerpts from Title IX's legislative history:

> Representative Green put it succinctly: "If we are writing the law, I would say that any institution could be all men or all women, but my feeling is that they do it with their own funds and not taxpayers' funds." *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, H.R. 5193, and H.R. 7248 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 92nd Cong., 1st Sess. 581 (1971). Representative Green also quoted with approval President Nixon, who had stated, "Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people. 117 Cong. Rec. at 39,257 (1971) (statement of Rep. Green). To Senator Bayh, the reach of Title IX was clearly restricted to federally funded institutions. *See* 118 Cong. Rec. at 5812. In support of Title IX, Senator McGovern stated, 'I urge my colleagues to take every opportunity to prohibit Federal funding of sex discrimination." 117 Cong. Rec. at 30,158.

120 F.3d at 1398.

Finally, the Court has previously held that because legislation enacted pursuant to Congress' power to enforce the guarantees of the Fourteenth Amendment imposes congressional policy on States involuntarily and often intrudes on traditional state authority, the courts "should not quickly attribute to Congress an unstated intent to act under [this] authority." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *see also City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997) (congressional enforcement power is not unlimited). There is nothing in Title IX that indicates a congressional intent to enforce the Fourteenth Amendment; its language and structure lead to the conclusion that it is Spending Clause legislation. *Rowinsky*, 80 F.3d at 1012 n.14. "Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States." *Id.* (quoting *Pennhurst*, 451 U.S. at 18).

Title IX is not a regulatory measure; it is an exercise of Congress' power to "fix the terms on which Federal funds shall be disbursed." *See Guardians Ass'n*, 463 U.S. at 599 (quoting *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 143 (1947)). As such, its interpretation, like that of Title VI, must be governed by limitations repeatedly and expressly recognized by this Court in construing Spending Clause legislation. The fact that these limitations do not apply to Title VII further supports Lago Vista's position that Title VI, not Title VII, is the most appropriate analogue to Title IX.

C. Policy considerations are relevant only insofar as they comport with a statute's limitations.

Gebser contends that Title IX must be construed more broadly than Title VII because of differences between the workplace and the school. Her argument is, essentially: (1) that school children require more protection because of their vulnerability; and (2) that schools should be liable in damages if they fail to provide that protection because schools act *in loco parentis*. Brief of Petitioners at 19-24. Lago Vista does not dispute that children, especially

young children, are more vulnerable than are adult employees. This vulnerability, however, is not peculiar to the school setting; children are vulnerable in nearly every facet of their lives simply because they are children. Society at large surely has a moral obligation to nurture and protect children. Legislators, state and federal, may enact versions of that obligation into law. It is a simple fact, however, that Title IX does not say that school districts who opt to receive federal funds are liable for harassment without regard to fault. Moral obligations do not become *legal* obligations in the absence of state or federal legislation. And, as explained *infra*, there is good reason to doubt that a strict liability scheme judicially imported into Title IX would achieve the desired result of protecting children; a more likely result would be the rejection of federal funding — and the consequent nullification of Title IX — in state education.[8]

Congress did not choose to pattern Title IX after Title VII, nor did it enact Title IX pursuant to its Fourteenth Amendment enforcement power. Rather, it enacted Title IX pursuant to its spending power. Any interpretation or application of Title IX must take into account the limitations proscribed by its source and, for reasons set forth below, those limitations preclude adopting Gebser's proposed standards of liability. Insofar as Gebser disputes the wisdom of the legislature's course of action on the issue of sexual discrimination in the schools, her concerns should be addressed to Congress or to the states, not this Court. *See North Haven Bd. of Ed.*, 456 U.S. 512 at 536 n.26 ("These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of Title IX even were we to disagree with the legislative choice.")

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8. There is also reason to question whether it is morally acceptable to force a party to assume liability for the criminal conduct of another when that party neither knows nor has reason to suspect that the conduct is occurring.

II. AS UNDER TITLE VI, LIABILITY FOR DAMAGES CAN BE IMPOSED UNDER TITLE IX ONLY FOR AN INTENTIONAL VIOLATION OF THE ACT.

A. Title IX's Spending Clause origin limits the possible standards of liability.

The significance of Title IX's Spending Clause origin cannot be understated. As explained in *Pennhurst*:

> Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S. at 17 (citations omitted).

The crucial inquiry is not whether a fund recipient would knowingly undertake the obligations imposed, but whether Congress spoke so clearly that it can fairly be said that the recipient could make an informed choice. *Id.* at 25. "Though Congress' power to legislate under the spending power is broad, it does not

include surprising participating States with post acceptance or 'retroactive' conditions." *Id.*

"As a statute enacted under the Spending Clause, Title IX should not generate liability unless the recipient of federal funds agreed to assume the liability." *Rosa H.*, 106 F.3d at 654. Thus, in determining a school district's standard of liability under Title IX for a teacher's sexual abuse of a student, this Court must consider what standard school districts, as voluntary recipients of federal funds, could reasonably have anticipated. This inquiry is made more difficult, of course, by the fact that Congress not only did not expressly state a standard of liability for violations of Title IX, it did not expressly incorporate *any* private cause of action into Title IX. In such a case it is especially important to "respect the [limitations] applicable in Spending Clause cases and take care in defining the limits of [a] cause of action and the remedies available thereunder." *Guardians Ass'n*, 463 U.S. at 597.

Finally, it must be stressed that school districts receiving federal funds have a choice between accepting those funds and subjecting themselves to whatever standard of liability the Court adopts, or declining federal funds and freeing itself of the conditions imposed under Title IX. *See Grove City College*, 465 U.S. at 575 (educational institution may terminate federal funds and avoid Title IX requirements); *Guardians Ass'n*, 463 U.S. at 596-97 (discussing choices available to recipients of federal funds).

B. Congress implicitly conveyed that Title IX would be governed by Title VI standards.

Although Congress did not explicitly articulate the standards that would govern private causes of action under Title IX, it did not leave the courts wholly without guidance nor did it leave fund recipients wholly without notice. As discussed above, the language, history, and source of Title IX convey that it is to be governed by Title VI standards. In 1983, this Court recognized in *Guardians* that a monetary remedy can be imposed under Title VI only for an

intentional violation of that statute.[9] At least since that time, school districts have accepted federal funds with the expectation that they would be exposed to monetary liability only for intentional violations of Title IX. This understanding was reinforced by the Court's opinion in *Franklin*, which recognized that money damages are not available for an unintentional violation of Spending Clause legislation because "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." 503 U.S. at 74. This principle was in no way diminished by other statements made in *Franklin* nor did that opinion give school districts notice that they could be liable in damages for anything but an intentional violation of Title IX.

C. Gebser reads too much into *Franklin*.

Gebser places great emphasis on the following language from the Court's opinion in *Franklin*:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

503 U.S. at 75.

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9. Despite the fractured opinions in *Guardians*, it is apparent that a majority of the Court would not permit a damage remedy for an unintentional violation of Title VI. *See* 463 U.S. at 607 n.27. Even Gebser acknowledges that "damages may not be recoverable against funded entities under Spending Clause legislation for unintentional discrimination." Brief for Petitioners at 19 n.10.

Gebser asserts that this language forecloses the argument that Title IX's Spending Clause roots mandate an actual notice standard of liability. She reads this passage as establishing that "sexual harassment by a teacher, when attributable to the school district, fulfills the Spending Clause requirement of intentional discrimination and justifies the imposition of damages." Brief for Petitioners at 19 n.10. Gebser then asserts that, because of the Court's citation to *Meritor*, a teacher's sexual harassment is attributable to the school district under the standards applicable to Title VII and/or under general agency principles.

Contrary to Gebser's expansive interpretation of the language quoted above, the Franklin Court did no more than acknowledge that sexual harassment or abuse of a student by a teacher can constitute sexual discrimination under Title IX. This conclusion is supported by examining the context of the Court's original statement in *Meritor*. The question under discussion in that case was whether "unwelcome sexual advances that create an offensive or hostile working environment violate Title VII." 477 U.S. at 64. The statement, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex," was nothing more than an affirmative answer to that question. Thus, the *Franklin* Court's citation to *Meritor* simply directs courts to look to Title VII principles to determine what constitutes sexual harassment, *i.e.*, whether conduct is severe and pervasive enough to constitute illegal discrimination. *See Smith*, 128 F.3d at 1024. It accomplishes nothing more.

Because the Court in *Franklin* was not addressing the appropriate standard of liability for school districts when a teacher sexually harasses a student, the above-quoted language cannot be read to foreclose a requirement of actual knowledge on the part of the school district nor can it be read to mean that any sexual harassment by a teacher is considered an intentional violation of Title IX.

> *Franklin's* single citation to *Meritor Savings* to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context. We can find nothing in *Franklin* to support the . . . theory that Title IX can make school districts liable for monetary damages when the district itself engages in no intentional discrimination. There is nothing to suggest that Congress intended such a sweeping liability. More to the point, there is nothing to give notice to the recipient of federal funds that the funds carry the strings of such liability.

Rosa H., 106 F.3d at 656. Certainly the mere citation to *Meritor* cannot support the proposition that a teacher's secret illicit conduct is automatically imputed to the school district simply because of the teacher's position as a teacher.

Gebser also fails to appreciate a crucial difference between the facts in *Franklin* and the facts in the present case — the school district in *Franklin* had actual knowledge of the abuse and, not only did it fail to take remedial action, it discouraged the student from pressing charges against the offending teacher. *See* 503 U.S. at 63-64. Lago Vista, on the other hand, had no knowledge of Waldrop's abuse and no opportunity to remedy the situation. Gebser attempts to minimize this distinction by stating that "the Court [in *Franklin*] made no reference to those facts [actual knowledge] in its analysis of the Spending Clause objection to damages." Brief for Petitioners at 19 n.10. But certainly the existence of actual knowledge, which was expressly noted in the opinion, was significant to the Court's declaration that the case involved *intentional* discrimination. *See* 503 U.S. at 63, 74-75. Thus, the most that can be gleaned from the *Franklin* opinion regarding a school district's standard of liability under Title IX is that a school district may be liable for damages if it had actual knowledge of a teacher's sexual abuse of a student and failed to take remedial action. *See Smith*, 128 F.3d at 1022 (institutional liability in *Franklin* rested on institution's actions; Court did not address standard for

institutional liability based on teacher's action). This is not inconsistent with the approach taken by the Fifth Circuit in the present case.

III. GEBSER'S PROPOSED STANDARDS OF LIABILITY ARE NOT AVAILABLE FOR VIOLATIONS OF SPENDING CLAUSE LEGISLATION; ONLY AN ACTUAL KNOWLEDGE STANDARD OF LIABILITY IS APPROPRIATE UNDER TITLE IX.

Gebser proposes two alternate standards of liability — a modified constructive notice standard and an agency standard. Neither of these standards limits a school district's liability for damages to intentional violations of Title IX. Thus, neither standard comports with school districts' Title IX contract with the federal government. The only appropriate standard is actual knowledge.

A. Modified constructive notice.

The first standard proposed by Gebser would cause a school district to answer in damages if it knew or should have known of a teacher's sexual harassment of a student or if the district did not afford students a reasonable avenue for complaint and redress. This standard encompasses three possible bases for liability: (1) actual knowledge; (2) constructive knowledge; and (3) failure to provide a reasonable avenue for complaint and redress.

1. Actual knowledge.

a. The actual knowledge standard comports with the requirement of an intentional violation.

Lago Vista agrees that actual knowledge is the appropriate standard of liability in the circumstances of this case; it disagrees that any other proposed standard may apply. Actual knowledge is required before damages may be assessed against the school district because, in accordance with Title IX's Spending Clause roots, only

an intentional violation by the recipient of the federal funds will support such a damage award. Because this is the standard that applies to Title VI, school districts, knowing that Title IX was patterned after Title VI, were entitled to expect that the same standard would apply in this context. Certainly, if Congress had intended that any other standard apply, it failed to articulate that standard with a clear voice. Simply put, only an actual knowledge standard of liability is part of the Title IX contract.

b. The school district need only have actual knowledge of a substantial risk of sexual harassment.

Gebser overstates the Fifth Circuit's holding by implying that that court would require actual knowledge of the specific abuse that is occurring. The basis of the court's holding in the present case was its prior holding in *Rosa H.* In that case, the court explained:

> Students need not show that the district knew that a particular teacher would abuse a particular student; the plaintiff could prevail in this case, for example, by establishing that the school district failed to act even though it knew that Contreras posed a substantial risk of harassing students in general. But Title IX liability for sexual harassment will not lie if a student fails to demonstrate that the school district actually knew that the students faced a substantial threat of sexual harassment.

106 F.3d at 659. Thus, actual knowledge of a substantial threat or risk is sufficient.

c. Actual knowledge must be possessed by one with the power to remedy the situation.

Gebser also overstates the significance of the Fifth Circuit's holding concerning who must have actual knowledge. That court did not identify the persons who must have knowledge by reference

to any particular job title, but by reference to their ability to act for the district to prevent or remedy the threat of sexual harassment. Again, *Rosa H.* is instructive:

> Whether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge.

106 F.3d at 660.

Recognizing that a school district can be liable in damages only for an intentional violation of Title IX, the Fifth Circuit's answer to this question is entirely reasonable. A school district cannot be said to have *intentionally* discriminated unless it had actual knowledge and failed to take appropriate remedial action. Unless the requisite knowledge is possessed by someone with the power and authority to take remedial action, the failure to take such action is not intentional.

Gebser appears to view the Fifth Circuit's position on this issue as unduly restrictive. It is not, however, the most restrictive reading of Title IX that has been adopted on this issue. For example, in *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 (11th Cir. Jan. 20, 1998), the Eleventh Circuit agreed with the Fifth Circuit: (1) that a school district is not liable under Title IX based on respondeat superior or other variants of agency law; and (2) that the district is liable only if it had actual notice of sexual harassment and then failed to act. *Id.* at *2. The *Floyd* court disagreed, however, that notice can be imputed to a school district if a supervisor with authority to take action to end the abuse has knowledge of the harassment. *Id.* Instead, the court looked at the statute and regulations, including the definition of "local educational agency" contained in 20 U.S.C. § 8801, and concluded that it must refer to state law to determine who is responsible for the administrative control or direction of the school district. *Id.* After an examination

of Georgia law, the court held, "For [Title IX] liability in Georgia, *the superintendent or the board* must have actual knowledge of the sexual harassment and then fail to take reasonable steps to end the abuse." *Id.* at *4 (emphasis added). This approach, which is more restrictive than that taken by the Fifth Circuit, illustrates that the standard of liability articulated in *Rosa H.* does not delineate the outer fringe of possible standards but represents an appropriate balancing of the needs of students *and* school districts in light of the language, history, purpose, and limitations of Title IX.

d. An actual knowledge standard will not encourage school districts to ignore the dangers of sexual harassment.

Gebser contends that adopting an actual knowledge standard of liability will encourage school districts to actively avoid learning of problems or potential problems concerning teacher harassment of students. Not only is this contention pure speculation, it is not supported by reason or logic. Aside from the moral implications of turning a blind eye to sexual harassment of students, public school districts and their supervisory personnel could face liability under 42 U.S.C. § 1983 for such a policy of deliberate indifference to the welfare of their students. *See Doe v. Claiborne County*, 103 F.3d 495, 506 (6th Cir. 1996) (sexual abuse by teacher is violation of due process); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 445 (5th Cir. 1994) (§ 1983 liability for deliberate indifference to sexual harassment of student); *Lipsett*, 864 F.2d at 901-902 (§ 1983 liability of supervisory officials for sexual harassment). Similarly, private educational institutions and their supervisory personnel could face liability under state tort law. There is no reason to believe that imposing an actual knowledge standard of liability under Title IX will significantly impact a school district's incentive to prevent sexual harassment of its students. But as discussed elsewhere in this brief, there is reason to believe that imposing any *other* standard of liability would give a school district incentive to decline federal funds and remove itself completely from the dictates of Title IX.

e. The OCR Guidance does not support imposing a more onerous standard of liability.

Gebser relies heavily on a recent Guidance issued by the Office of Civil Rights (OCR) to support her proposed standards of liability. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997). This reliance indicates her recognition that Title IX itself does not adequately notify school districts that accepting federal funds could expose them to unlimited monetary liability for conduct of which they have no notice. OCR's interpretation of Title IX is not, however, a sufficient basis for imposition of such liability.

First, the OCR Guidance is not a regulation nor is it an interpretation of regulations. *Smith*, 128 F.3d at 1033. Second, OCR's lack of analysis to support its conclusions counsels against adopting those conclusions. For example, OCR wholly fails to appreciate: (1) the statutory language of Title IX; (2) Title IX's Spending Clause origin; or (3) the differences between Title IX and Title VII. *See id.* (noting deficiencies in OCR analysis). It also makes no effort to determine the financial impact its policy would have on school districts receiving federal funds or the likelihood that those districts would simply forego federal funds, escape the conditions imposed by Title IX and, as a result, defeat Congress' purpose in enacting that statute.

Third, the "labyrinth of factors and caveats" contained in the OCR Guidance reinforces the conclusion that school boards were not put on notice that, by accepting federal funds, they would be liable to answer in damages for sexual harassment by a teacher even though the district had no knowledge of that harassment. *See Davis*, 120 F.3d at 1404 n.23 (OCR factors reinforce conclusion that board was not on notice of potential liability for student-student sexual harassment).

Finally, the Guidance cannot be given retroactive effect because this would constitute "surprising participating [school

districts] with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 17. Because the legitimacy of Spending Clause legislation depends on a recipient's acceptance of funds with full knowledge of the conditions and consequences, those conditions and consequences must be made known at the time the funds are accepted and not at some later date. *See id.* Contrary to Gebser's assertion that the Guidance merely restates the longstanding position of the Department of Education, it is actually that Department's first articulation of its position on an elementary or secondary school's liability in damages for sexual harassment of a student by a teacher. The OCR policy memorandum to which Gebser refers was addressed only to colleges and universities and predated this Court's recognition of a monetary remedy for violations of Title IX. *See* OCR Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement & Policy Service to Regional Civil Rights Directors (Aug. 31, 1981).

Thus, even if this Court accepts the OCR Guidance as properly stating a school district's standard of liability under Title IX (which, of course, Lago Vista disputes), this standard cannot be applied in the present case because it was not articulated until years after the events here at issue occurred.

f. Gebser's varying theories of liability illustrate the lack of notice to school districts.

Gebser's history of advocating different theories of liability at different stages of this litigation illustrates that Congress did not unambiguously impose any standard of liability more onerous than actual knowledge. In the district court, Gebser alleged that Lago Vista was *strictly liable* under Title IX for Waldrop's wrongful conduct and was also liable for its failure to implement adequate procedures to guard against sexual harassment. (J.A. 15a.) In her motion for partial summary judgment, she explicitly rejected agency principles as supplying the standard of liability under Title IX: "A remedy requiring proof of agency or apparent agency is no remedy at all." (R. 335.) She also did not pursue her theory of liability

based on lack of an adequate grievance procedure. The district court specifically noted, "Plaintiff contends school districts are held strictly liable for the discrimination by their teachers in violation of Title IX." (R. 543; emphasis added.)

In framing the issue before the Fifth Circuit, Gebser asked only whether actual or constructive knowledge by school district officials is required by this Court's opinion in *Franklin v. Gwinnett County Indep. School Dist.*, 503 U.S. 60 (1992). Rather than pursuing her argument that the school district is strictly liable, she asserted that Lago Vista is liable because of the high degree of authority it granted to teachers over students, which authority aided Waldrop in engaging in his illicit relationship with her. In short, she asserted that Lago Vista's liability rests on the principles stated in section 219(2)(d) of the Restatement (Second) of Agency. The Fifth Circuit noted that Gebser was not pursuing a theory of liability based on constructive notice.[10] *Doe v. Lago Vista Indep. School Dist.*, 106 F.3d at 1225. Gebser did not challenge this assessment of her position.

Now, in this Court, Gebser again proposes an agency theory of liability, resurrects her "inadequate grievance procedure" theory (which she has not urged since her second amended petition in the district court), and intimates that Lago Vista liability can be premised on its constructive knowledge of Waldrop's inappropriate remarks

10.

> Doe does not pursue the constructive notice theory because, as in *Leija*, there is not enough evidence for a jury to conclude that a Lago Vista school official should have known about the abuse. Doe did not present any evidence that any Lago Vista employee other than Waldrop knew of the relationship. School officials knew of complaints about Waldrop's tendency to make inappropriate remarks to students, but those complaints did not concern Doe and gave officials no reason to think that Waldrop would have sex with a student.

106 F.3d at 1225.

to other students, notwithstanding her abandonment of that contention at the Fifth Circuit. The very fact that Gebser has been unable to consistently identify and advocate a specific standard of liability (and the fact that the courts of appeals and district courts are so badly divided on this issue) simply highlights that school districts were not given adequate notice under Title IX of the circumstances under which they could be held liable for damages. In this situation, the appropriate standard is the only one that could reasonably have been anticipated in light of Title IX's Spending Clause origin and its connection to Title VI — actual knowledge.

2. Constructive knowledge.

Constructive knowledge is not an appropriate standard of liability for damages under Title IX because it is a negligence standard and, as discussed in detail above, monetary liability cannot be imposed under Title IX in the absence of an intentional violation by the recipient of the federal funds. *See Smith*, 128 F.3d at 1022 ("should have known" is negligence standard); *Rosa H.*, 106 F.3d at 656 (constructive notice is grounded in negligence).

For Title IX purposes, "a school district has not sexually harassed a student unless it *knows* of a danger of harassment and *chooses* not to alleviate that danger." *Rosa H.*, 106 F.3d at 659 (emphasis added). Constructive knowledge is not sufficient because a school district cannot "choose" any course of action (or inaction) and cannot *intentionally* commit, allow, condone, or even ignore sex discrimination based only on what it "should know." Such intentional choices can only be made based on what the district actually knows.

3. Reasonable avenue for complaint and redress.

Although she did not raise this theory in the Fifth Circuit, Gebser now contends that a school district should be held liable under Title IX if a teacher sexually harasses a student and the school district did not have in place a reasonable avenue for complaint

and redress. This proposal should be rejected because the failure to implement and/or publish a grievance procedure: (1) does not constitute discrimination based on sex; and (2) is a constructive notice/negligence concept that does not fulfill the requirement of an intentional violation. Further, the appropriate remedy for such a failure is injunctive relief mandating the implementation and publication of an appropriate grievance procedure, not the imposition of unlimited damage liability.

a. Lack of a grievance procedure is not discrimination based on sex.

Title IX prohibits discrimination "on the basis of sex" under federally funded education programs or activities. 20 U.S.C. § 1681(a) (1990). It is fundamental, then, that conduct that is alleged to violate this statute impact the complainant because of his or her gender. A policy, or lack of policy, that impacts males and females alike cannot be said to discriminate on the basis of sex. As noted by the Fifth Circuit, "sexual overtures directed at both sexes, or behavior equally offensive to both males and females, is not sex discrimination." *Rowinsky*, 80 F.3d at 1016.

The lack of an adequate procedure to report sexual harassment does not amount to discrimination on the basis of sex and, therefore, does not support imposing liability for a violation of Title IX. Only if a school district provides an avenue for complaint and redress to one gender and not the other can it be said that the district's inadequate procedures constitute discrimination based on sex. In such a case, the district would be liable under Title IX for its own intentional discrimination. But where the district is neglectful of all of its students, there is no discrimination and no violation of Title IX. As discussed above, this does not mean that school districts will intentionally fail to implement appropriate procedures; such deliberate indifference to the needs of its students would surely raise the possibility of § 1983 litigation.

b. Lack of a grievance procedure is negligence.

Even if the failure to implement and publish a grievance procedure can be considered sex discrimination, that discrimination would be the result of negligence rather than intent. *See Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 109 (3d Cir. 1994) (exonerating effect of remedial policy stems from negligence principles). For reasons stated above, school districts cannot be held liable in damages for a negligent violation of Title IX.

c. Title IX regulations do not support imposing monetary liability for a failure to implement or publish an appropriate grievance procedure.

Regulations adopted pursuant to Title IX require that a recipient of federal funds "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX]." 34 C.F.R. § 106.8(b). Each recipient is also required to notify students and parents that it does not discriminate on the basis of sex. 34 C.F.R. § 106.9(a). Nothing in the regulations informs school districts that they face potential monetary liability for a failure to comply with these procedural requirements. The more reasonable expectation is that a school district could be compelled to comply or, if its procedures remain deficient, risk the loss of federal financial assistance. *See Grove City College v. Bell*, 465 U.S. 555 (1984) (termination of federal funds for refusal to execute Assurance of Compliance). Because school districts were not given notice that their acceptance of federal funds could lead to monetary liability for procedural infractions, no such liability can be imposed.

d. Lago Vista had an appropriate grievance procedure in place but Gebser was determined not to report Waldrop's conduct.

Regardless of whether the failure to adopt and publish a grievance procedure can lead to monetary liability generally, it

cannot lead to liability against Lago Vista in the present case. First, Lago Vista did have an adequate grievance procedure in place. That procedure specifically directed any student or parent having a complaint alleging sexual harassment to request a conference with the principal or designee. (J.A. 46a.) The principal or designee was then required to hold a conference within five days and was responsible for coordinating an appropriate investigation. *Id.* The investigation was to be completed within ten days. *Id.* If the student was not satisfied with the outcome of the investigation, he or she had the right to institute an appeal. *Id.*

Gebser complains that this procedure is not sufficient because it was not brought to the students' attention. But she also emphasizes the prior incident in which Waldrop was accused of making inappropriate remarks in his classroom. In that instance, the students and their parents had no trouble invoking the appropriate procedure and the school principal had no hesitation in implementing that procedure. (J.A. 76a-80a.)

It is also apparent from the record that the reason Gebser did not attempt to register any complaint about Waldrop was not because she was unaware of any reasonable avenue of complaint or because she believed that the school district would tolerate Waldrop's behavior, but because she did not want to complain. Concerning Waldrop's use of sexual innuendo in his conversations with her, Gebser specifically stated that she did not report the conduct because she was not offended by it. (R. 350.) Even when the relationship escalated, she made a conscious choice not to report it. (R. 354-55.)

Gebser testified that she knew, on the very first occasion Waldrop initiated physical contact between the two, that his conduct was inappropriate. (J.A. 55a.) She also testified that she could have "set off sirens" by reporting Waldrop's conduct; that if she had reported the relationship to someone in authority at Lago Vista, the relationship would have ended immediately; and that she never believed that Lago Vista would tolerate such a teacher-student

relationship. (J.A. 62a-63a, 65a.) Most telling, Gebser testified that the reason she didn't report the relationship was because "obviously, I wouldn't be in his class anymore and I wouldn't have, I guess, sort of the intellectual companionship that I was getting with him." (J.A. 62a.)

Given Gebser's knowledge that the school district would act promptly to terminate her relationship with Waldrop and given her determination to hide that relationship so she could remain in Waldrop's classes, there is no causal link between Lago Vista's dissemination of its grievance procedure and any harm caused to Gebser by Waldrop. Even Gebser acknowledges that the purpose for requiring a grievance procedure is to convey to students that the school will not tolerate sexual harassment. Brief for Petitioners at 29. Gebser *knew* that the school district would not tolerate Waldrop's conduct but still she chose not to report it to anyone with the authority to stop it. In these circumstances, even if Lago Vista's grievance procedure is found to be deficient, the appropriate remedy is to issue an injunction mandating that the deficiency be corrected, not to compel the payment of damages for harm that would have occurred in any event. This solution inures to the benefit of all students rather than providing a monetary benefit to one student at the expense of the others.

B. Agency.

The second standard of liability proposed by Gebser would cause a school district to answer in damages if a teacher is aided in harassing a student by virtue of his agency relationship with the district. Applying this principle as envisioned by Gebser would effectively result in school districts being held strictly liable for all sexual harassment committed by a teacher against a student.

The genesis of Gebser's agency proposal is the *Franklin* Court's citation to *Meritor* and the Meritor Court's statement that "Congress wanted courts to look to agency principles for guidance" in defining employer liability under Title VII. *See Franklin*, 503 U.S. at 75;

Meritor, 477 U.S. at 72. For all the reasons discussed above, Title IX is not properly governed by Title VII principles. But even if it were, the *Meritor* Court warned that "common-law [agency] principles may not be transferable in all their particulars to Title VII." *Meritor*, 477 U.S. at 72. Courts must be even more wary of importing agency principles into Title IX because of its Spending Clause origin and the contractual nature of the statute.

Section 219(2)(d) of the Restatement (Second) of Agency, upon which Gebser relies, states:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> * * *
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219(2)(d) (1957).

Even as applied in Title VII cases,[11] this principle is not without limits. For example, in *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995), the court of appeals discussed the application of section 219(2)(d) to a claim of hostile environment sexual harassment committed by a supervisor against an employee.

11. One esteemed judge has pointed out that the Court's statement in *Meritor* was not a ruling that Title VII incorporates the American Law Institute's *Restatement of Agency* and that Congress would have been "loopy" to have intended to incorporate the Restatement by reference. *Jansen*, 123 F.3d at 506, 508 (Posner, C.J., concurring and dissenting). Chief Judge Posner also noted that the Restatement predates even Title VII and was not written with the issue of sexual harassment in mind. *Id.* at 509-10.

The court noted that,

> [i]n a sense, a supervisor is always "aided in accomplishing the tort by the existence of the agency" because his responsibilities provide proximity to, and regular contact with, the victim,

but that "such a reading of section 219(2)(d) 'argue[s] too much.' " *Id.* at 1397; *see also Lago Vista*, 106 F.3d at 1226 (it is too broad a reading of § 219(2)(d) to hold employee aided in accomplishing tort in that he would not have been there but for job). It is apparent from the comments accompanying the Restatement that a narrower concept was intended — one that requires that the tort be accomplished by conduct associated with the agency status. *Id.*; *see also Smith*, 128 F.3d at 1029 (Restatement embraces narrow concept).

This narrow view of section 219(2)(d) is supported by the examples given in the accompanying comments:

> Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant, as where one purports to speak for his employer in defaming another or interfering with another's business. . . . In other situations, the servant may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from third persons. Again, the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position.

Restatement (Second) of Agency § 219 cmt. e (1957) (citation omitted).

In addition, comment (e) to section 219 refers to section 261, which is entitled, "Agent's Position Enables Him to Deceive."

Comment (a) to that section states that

> [l]iability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person *the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.*

Restatement (Second) of Agency § 261 cmt. a (1957) (emphasis added); *see also Gary*, 59 F.3d at 1397.

The mere fact that a teacher has access to students by virtue of his position as a teacher is not sufficient to impute liability to the school district under section 219(2)(d). As recognized by the Fifth Circuit, such a rule "would create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student." *Rosa H.*, 106 F.3d at 655; accord *Lago Vista*, 106 F.3d at 1226; *see also Smith*, 128 F.3d at 1029 (section 219(2)(d) creates strict liability which cannot form basis for monetary award under Spending Clause legislation). Thus, proper application of section 219(2)(d) must be tempered by application of an additional principle of agency law — that a principal will not be bound by the conduct of the agent unless the belief in the agent's apparent authority is reasonable and the third person actually believes that the agent is authorized. *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 500 (7th Cir. 1997) (Flaum, J.), *cert. granted in part sub nom, Burlington Industries, Inc. v. Ellerth*, 66 U.S.L.W. 3283 (Jan. 23, 1998); *Gary*, 59 F.3d at 1398; *Bouton*, 29 F.3d at 109. In other words,

> [i]f a person has information which would lead a reasonable man to believe that the agent is violating orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability.

Gary, 59 F.3d at 1398 (quoting Restatement (Second) of Agency § 166 cmt. a).

This comports with the principle implicit in the comments to the Restatement — that being "aided by the agency relationship" requires more than merely furnishing proximity to the victim.[12]

In the present case, the record clearly reflects that Gebser did not believe that Waldrop was acting with any authority conferred on him by the school district. She readily acknowledged that she knew that her relationship with Waldrop was inappropriate, that if she reported it to school officials they would end the relationship immediately, and that she was never led to believe that the school district would tolerate such a relationship. (J.A. 55a-56a, 63a, 65a.) This knowledge negates the possibility that Gebser held any reasonable belief that Waldrop was acting with apparent authority.

The record also negates any inference that Gebser believed that Waldrop would use his position as a teacher to inflict adverse consequences on her if she refused his advances. Gebser states in her brief that her "only means of getting the educational programs she needed depended on the good graces of Waldrop." Brief for Petitioners at 4. There is absolutely no support in the evidence for this statement. The record is devoid of any indication that Waldrop conditioned Gebser's admission into his classes (or her grades or advancement) on her participation in sexual activities. There is also no evidence that Waldrop had the power to exclude Gebser from his classes or that Gebser believed he had any such power. In

12. This limitation on agency principles is recognized by the United States and the Equal Employment Opportunity Commission in their *amici* brief filed with this Court in *Faragher*. The government proposes in that brief that, to show that a supervisor was aided by his agency relationship, a plaintiff must show: (1) she feared adverse employment consequences if she resisted or complained; and (2) her fear was objectively reasonable. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner [Faragher] at 10, 21.

fact, there is no evidence that Waldrop was the only teacher at Lago Vista who was qualified to teach the advanced courses Gebser wanted to take. Thus, there is no evidence that, if Gebser had reported Waldrop and had him removed from his position, she would have been deprived of any of those courses. In sum, Gebser's concern was not that she would be excluded from Lago Vista's advanced placement program, but that she would be separated from Waldrop.

Gebser further states that she "submitted to Waldrop in order to retain her position as his student." Brief for Petitioners at 2. Again, the record does not support this statement. There is no evidence that Gebser carried on a sexual relationship with Waldrop because she feared that otherwise she could not be his student. Rather, the evidence is that she decided not to *report* the relationship so that she could remain his student. (J.A. 62a.) Her conduct was not motivated by any fear of retaliation by Waldrop, but by her knowledge that Waldrop would lose his job if the school district learned of his transgressions. (R. 355.) *Thus, she refused to report the relationship precisely because she knew that Lago Vista would act to protect her.* In these circumstances, it cannot be said that Waldrop was in any manner aided by his agency relationship with the school district.

C. Strict liability.

As recognized by the Fifth Circuit, Gebser's proposed application of agency principles would lead, in effect, to school districts being held strictly liable whenever a teacher sexually harasses a student. *See Lago Vista*, 106 F.3d at 1226; *Rosa H.*, 106 F.3d at 655. An argument could be raised in every case that the teacher's opportunity to take advantage of the student was enhanced by "the aura of an instructor's authority, the trust that we encourage children to place in their teachers, or merely the opportunity that teachers have to spend time with children." *Rosa H.*, 106 F.3d at 655. But, for all the reasons discussed above, "strict liability is not part of the Title IX contract." *Canutillo*, 101 F.3d at 399. Further, there is no persuasive policy reason for holding

school districts strictly liable for criminal conduct committed by its teachers. *Id.*

Strict liability is imposed in the product liability context in part because manufacturers are better able to spread liability costs among consumers. *Leija*, 101 F.3d at 399. School districts do not have that same cost-spreading ability. *Id.* Strict liability is also appropriate in products cases because manufacturers are in a better position than consumers to discover defects in products. *Id.* This principle does not apply in the sexual harassment context.

> Human beings are inherently unpredictable, making it impossible for a school district to discover potential human 'defects' the way, for example, that a manufacturer, for its products, can design against defects, or inspect for them on an assembly line. In addition, the Constitution and state and federal law limit the extent to which a school district can examine, inquire about, or investigate its employees and their backgrounds and characteristics.

Leija, 101 F.3d at 399.

The Fifth Circuit is not the only court to recognize that strict liability is not an appropriate standard in the sexual harassment context. *See Jansen*, 123 F.3d 490 (rejecting strict liability in Title VII case involving sexual harassment of employee by supervisor). Judge Coffey, in his separate opinion in *Jansen*, noted that the policy reasons behind imposing strict liability in the products arena simply do not apply to employment discrimination based on sex. *Id.* at 544-46 (Coffey, J., concurring and dissenting). In addition to the differences noted by the Fifth Circuit (as quoted above), Judge Coffey also pointed out that the cost-benefit analysis that underlies strict liability does not exist in this setting because "obviously there is no gain to an employer when one of his supervisory employees engages in the sexual harassment of another employee." *Id.* at 544. Similarly, there is no gain to a school district when a teacher sexually harasses a student.

Because strict liability is not an appropriate standard of liability under Title IX, the Court should reject that standard and Gebser's proposed agency standard which, in effect, imposes strict liability in the context of teacher hostile environment sexual harassment of a student.

IV. THE STANDARDS OF LIABILITY PROPOSED BY GEBSER WOULD DEFEAT THE PURPOSE OF TITLE IX.

The two purposes of Title IX are: (1) to avoid using federal funds to support discriminatory practices; and (2) to provide individual citizens protection against those practices. *Cannon*, 441 U.S. at 704. Thus, Congress invoked its spending power to induce voluntary cooperation with a federal policy against discrimination based on sex. *Davis*, 120 F.3d at 1406 n.26; *see Rowinsky*, 80 F.3d at 1013 ("the value of a spending condition is that it will induce the grant recipient to comply with the requirement in order to get the needed funds"). But if school districts decline federal funds, as they are entitled to do, the policy objectives underlying Title IX will remain unfulfilled. *Davis*, 120 F.3d at 1406 n.26; *Rowinsky*, 80 F.3d at 1013.

The possibility that school districts will forego federal funding rather than accept unlimited exposure to monetary liability for circumstances beyond their knowledge and control is not remote. As explained by the Eleventh Circuit in *Davis*:

> Prospective recipients will decline federal funding and current recipients will withdraw from federal programs if the cost of legislative conditions exceeds the amount of the disbursement. Federal funding represents only 7% of all revenues for public elementary and secondary schools in the United States. During the 1992-1993 school year,[13] for example, American schools received

13. Waldrop's physical relationship with Gebser began in 1992. (J.A. 55a.)

> $17,261,252,000 from the federal government out of a total budget of $247,626,168,000.
>
> School authorities must weigh the benefit of this relatively small amount of funding against not only the threat of substantial institutional and individual liability . . . but also the opportunity costs of devoting to litigation hours that might otherwise be spent running their schools. . . . Imposing the liability of the sort envisioned by appellant could induce school boards to simply reject federal funding—in contravention of the will of Congress.

120 F.3d at 1406 n.26.

"The imposition of liability beyond that which is likely to deter sexual harassment serves no constructive purpose. . . ." *Jansen*, 123 F.3d at 498 (Flaum, J.). In the employment context, such liability imposes unnecessary costs on employers, which costs are ultimately passed on to consumers. *Id.* In the school context, while some of these costs may be passed on to taxpayers by increasing school taxes, it is more likely that the children will bear the brunt of the costs in the form of fewer programs and lesser quality materials.[14] It is an unmistakable fact that school district money that is paid out in damage recoveries (or for increased insurance premiums) cannot be used to educate.[15]

14. This is a likely result whether the school district chooses to incur liability costs or whether it declines to accept federal assistance. In either event, the district will have fewer resources available to spend on its students.

15. It is ironic that the more money a school district must pay for incidents of sexual harassment, the less money it will have available to institute programs and policies to prevent or detect sexual harassment in the future.

The Court should also recognize the injurious effect Gebser's proposed standards would have on teacher-student relationships in general. It has been recognized that imposing strict liability under Title VII would bring about a fundamental reorientation of the employer-employee relationship and would have a chilling effect on interaction in the workplace. *See Jansen*, 123 F.3d at 540 (Coffey, J., concurring and dissenting). This chilling effect would be even more devastating in the schools because contact between teachers and students is so crucial to maintaining a proper educational environment. If school districts are to be held liable for teacher harassment regardless of the district's knowledge or fault, they will be forced to protect themselves by instructing teachers to keep their distance from the students. Any individual attention or assistance would necessarily be discouraged. In short, if liability is imposed simply because the school district affords teachers proximity to students, then liability will be avoided only by erecting barriers between teachers and students. This destruction of teacher-student association is surely not what Congress intended in enacting Title IX.

V. THE ONLY STANDARD BY WHICH LAGO VISTA COULD BE LIABLE IN THE PRESENT CASE IS STRICT LIABILITY.

For all the reasons stated above, the appropriate standard by which to determine a school district's liability under Title IX for a teacher's sexual harassment of a student is the actual knowledge standard articulated by the Fifth Circuit:

> [S]chool districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Lago Vista, 106 F.3d at 1226. In the present case, there is no

evidence that Lago Vista had actual knowledge of Waldrop's harassment of Gebser or of any substantial risk of such harassment.

Although Lago Vista urges the Court to adopt this standard of liability, it must point out that it is not liable under the facts of this case even if the Court adopts a lesser standard. There is no evidence that Lago Vista should have known of Waldrop's harassment of Gebser. The record shows that Gebser actively concealed the relationship from teachers, administrators, and fellow students alike (J.A. 62a-64a) and that no physical contact ever occurred on Lago Vista property (J.A. 59a). Waldrop's prior inappropriate (and somewhat ambiguous) remarks, which were directed at both male and female students, gave Lago Vista no reason to suspect that he might engage in illicit sexual conduct with a student. (J.A. 77a.) Thus, Lago Vista is not liable even if a constructive knowledge standard is imposed.

Similarly, Lago Vista is not liable under Gebser's agency theory because there is no evidence that she believed that Waldrop was authorized by the school district to engage in a sexual relationship with her or that any such belief would be reasonable. Gebser, herself, testified that she knew that the relationship was inappropriate and that the school district would not tolerate it. (J.A. 55a, 63a.) Waldrop obviously did not have actual authority to engage in the offending conduct and Gebser's knowledge that his conduct was beyond the bounds of an appropriate teacher-student relationship negates any inference of apparent authority. There is plainly no agency issue.

Lago Vista also cannot be held liable on the basis that it did not have a suitable grievance procedure available to students. It did have such a procedure and that procedure was easily invoked and properly followed by two other students who had been offended by Waldrop's remarks. Again, Gebser did not believe that Lago Vista would tolerate Waldrop's behavior nor is there any evidence that Waldrop ever threatened to lower her grades or remove her from his classes if she did not comply with his requests. Rather,

the evidence is that Gebser chose not to report Waldrop precisely because she *knew* that such a report would bring an end to the relationship. (J.A. 62a-63a.) No grievance procedure would have altered the course of this relationship.

The only standard that could result in liability in this case is strict liability, an extreme that is unavailable because of Title IX's language, history, and source. Adopting this extreme would also be unwise because it would leave a school district with two alternatives, neither of which is acceptable. It could: (1) choose to forego federal financial assistance, which would defeat the congressional purpose in enacting Title IX; or (2) accept federal financial assistance and risk devastating financial, emotional, and educational consequences for the district and its students. Congress cannot have intended such a choice; it cannot have intended to impose strict liability.

The proper disposition of the present case is clear. The Court should reject strict liability — the only standard under which Lago Vista could be liable to Gebser. The judgment of the court below can be affirmed on that basis alone. Even so, in light of the confusion in this area and Lago Vista's own need to determine whether it can afford to accept federal funds in the future, Lago Vista urges the Court to go further and to affirmatively adopt the actual knowledge standard articulated by the Fifth Circuit.

CONCLUSION

For the foregoing reasons, respondent Lago Vista Independent School District respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases Cited:

Page

Contents

Contents

SUMMARY OF ARGUMENT IN REPLY

The question in this case is under what circumstances a federally funded school district is liable under Title IX for its failure to protect a minor student from her teacher's intentional sex discrimination, in the form of sexual harassment. This is the sole question that remains open after the Court's decisions in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Together those cases establish: (1) that an implied right of action exists for violations of Title IX, *Cannon*, 441 U.S. at 705-06; (2) that monetary damages are available for intentional discrimination under Title IX, *Franklin*, 503 U.S. at 74-75; and (3) that sexual harassment of a student by a teacher is intentional discrimination of the sort for which damages are available. *Id.* (*citing Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

There is no question that Petitioner was subjected to intentional sex discrimination by her teacher. Under *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this fact disposes of any Spending Clause objection to the award of damages. The only question is whether the school district is liable for that discrimination. Respondent's long disquisition on the nature of Spending Clause statutes is thus beside the point. Its painstaking analogy to Title VI, in particular, leads nowhere, for Respondent points to no Title VI decision refusing to hold a funded program liable for intentional discrimination by an agent of the program. Respondent's Spending Clause argument and its Title VI analogy serve mainly to confuse the issue by conflating two distinct inquiries: was Gebser subjected to intentional sex discrimination? and, is the school district responsible for failing to protect Gebser from that discrimination? Once these two questions are properly disentangled, most of Respondent's arguments fall by the wayside.

On the question of the school district's responsibility for its teacher's intentional sexual harassment, it is useful to anchor the analysis by way of a comparison to Title VII, under which the issue of enterprise liability has been extensively litigated and is now before the Court in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997). It is useful *not* because the language of Title IX closely parallels that of Title VII, but because the *differences* between Title IX and Title VII cut in favor of broader enterprise liability under Title IX.

Every antidiscrimination statute must, to be meaningful, reach the acts of subordinate officials; it is almost always subordinate officials who do the discriminating that these statutes set out to prohibit. The question is how, and how broadly, that is done. Title VII does so by defining "employers," who are prohibited from discriminating, to include "agents of employers." 42 U.S.C. § 2000e(b). Title IX does so by providing that no person "shall, on the basis of sex, be subjected to discrimination under" funded programs rather than "by" funded programs. The breadth of Title IX's basic injunction thus makes unnecessary the express inclusion of "agents" by which Title VII extends its antidiscrimination mandate to those who actually carry out all forms of discrimination within the organization.

Based on the text, context, and purpose of Title IX, we argue that the Fifth Circuit's actual notice standard of liability for sexual harassment is misconceived. Actual notice of and failure to redress harassment is only one basis for school district liability. A school district has failed to discharge its Title IX responsibility, and should be liable for teacher harassment: (a) where it knew or should have known that harassment was taking place, *or* failed to afford adequate procedures for preventing, discovering, and remedying harassment; or (b) where it placed the teacher in a position of authority over the victim that aided the teacher in carrying out the harassment. Most of Respondent's arguments both for actual notice liability and against any broader standard of liability stand or fall with its interpretation of Spending Clause requirements, to which we will turn first in Part I. Once the Spending Clause argument is disposed of, the "actual knowledge" standard collapses, for, as we discuss in Part II, it cannot be reconciled with the text and purpose of Title IX. Most of Respondent's remaining arguments boil down to two: "unfair surprise" and "the floodgates of litigation." We will return to these arguments, and to the appropriate standards of liability, below in Parts III and IV.

It should be borne in mind throughout the analysis that, notwithstanding Respondent's argumentative recitation of the facts, this case was resolved against Petitioner below on Respondent's motion for summary judgment; all disputed issues of fact must therefore be resolved against Respondent. *See General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997).

I. DAMAGES ARE AVAILABLE UNDER TITLE IX NOT ONLY FOR A SCHOOL DISTRICT'S OWN INTENTIONAL DISCRIMINATION BUT FOR A SCHOOL DISTRICT'S FAILURE TO PROTECT INDIVIDUALS FROM INTENTIONAL DISCRIMINATION UNDER ITS PROGRAMS.

Respondent's argument for upholding the Fifth Circuit's "actual notice" standard for school district liability rests almost entirely on its erroneous Spending Clause analysis.[1] Respondent argues at great length

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1. This Court has reserved the question whether Title IX is based solely on Congress' Spending Clause power, or is based as well on Congress' power under Section 5 of the Fourteenth Amendment. *See, e.g., Franklin*, 503 U.S. at 75 n.8. In a case involving a claim of Eleventh Amendment immunity, in which the source of congressional power was critical under *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), a panel of the Seventh Circuit recently determined that Title IX was enacted under Section 5 as well as the Spending Clause. *See Doe v. University of Illinois*, Nos. 96-3511 and 96-4148, 1998 U.S. App. LEXIS 3881 (7th Cir., Mar. 3, 1998), slip op. at 12; *see also Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997). *But see Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997) (treating Title IX as Spending Clause legislation); *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1398 n.12 (11th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 75-843). The Seventh Circuit's *Doe* decision partially undermines the reasoning of the earlier panel decision in *Smith v. Metropolitan School District*, 128 F.3d 1014 (7th Cir. 1997), on which Respondent relies here. The *Smith* panel, following *Rosa H.*, grounded its conclusion that a school district could be liable under Title IX only for its own intentional discrimination, and its adoption of the "actual knowledge" standard for liability in teacher harassment cases, in part on its treatment of Title IX as Spending Clause legislation. *Id.* at 1028-33. Neither *Smith* nor *Rosa H.* considered the possible Section 5 basis for Title IX (though *Smith* relied in turn on *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996), which did briefly consider and reject the proposition that Title IX was also Section 5 legislation. *Id.* at 1012 n.14).

It is not clear that the Court needs to decide whether Title IX is Section 5 legislation or only Spending Clause legislation to resolve this case. Respondent invokes the purported Spending Clause basis of Title IX for two related purposes: to support its claim that a school district can be

(Cont'd)

that Title IX, like Title VI, is based on Congress' Spending Clause power, and that monetary damages are therefore available only in cases of intentional discrimination. *See* Br. of Resp. at 10-28. But the Spending Clause argument is quite beside the point. Gebser was clearly subjected to intentional discrimination by Respondent's agent; the question here is under what circumstances the school district is liable for having failed to prevent or remedy that intentional discrimination.

1. Respondent's laboriously developed analogy to Title VI, and its invocation of *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), is a red herring — one that *Franklin* has already disposed of. Five members of the Court in *Guardians* concluded that there could be no damages remedy under Title VI in the absence of intentional discrimination.[2] But that decision in no way supports the Respondent's argument here.

The issue in *Guardians* was whether Title VI authorized damages for *unintentional* discrimination based on a disparate impact theory — that is, in a case in which *no* actor was shown to have engaged in intentional discrimination. This case, like *Franklin*, clearly involves

(Cont'd)
liable only for its own intentional discrimination, and to fortify its claim of "unfair surprise" by reference to the "contractual nature" of Spending Clause legislation. Br. of Resp. at 23-24. As we explain below, however, *Franklin* disposes of the first claim, even on the assumption that Title IX is only Spending Clause legislation; the Section 5 argument would simply hammer another nail in the coffin. The related claim of "unfair surprise" is simply unconvincing given the history of Title IX regulations and precedents that predated the incidents at issue here. *See infra* p. 13.

2. In *Guardians*, Justice White provided the fifth vote for each of two propositions: (1) that unintentional discrimination was actionable under Title VI, 463 U.S. at 593; and (2) that damages were nonetheless unavailable for such unintentional violations, *id.* at 603. Four Justices concluded that unintentional discrimination was not actionable at all under Title VI. *See id.* at 610 (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment). Four other Justices agreed with Justice White that Title VI (or valid regulations promulgated under Title VI) did reach unintentional discrimination, but concluded, contrary to Justice White, that damages were available for such violations. *See id.* at 615 (Marshall, J., dissenting); *id.* at 639, 645 (Stevens, J., dissenting).

intentional discrimination in the form of sexual harassment by a teacher with extensive responsibility for Gebser's education and authority over her.[3] In such a case, *Franklin* indicates that the intentional nature of the agent's conduct satisfies any Spending Clause objection to the award of damages.[4] *Franklin* has disposed of the Spending Clause issue, and has implicitly rejected the proposition that a school district can be liable in damages only for its *own* intentional discrimination.

2. *Franklin*'s resolution of the issue — that a school district may be liable under Title IX for intentional discrimination by its teachers without itself intending to discriminate — is entirely consistent with the language and purposes of Title IX.

a. Title IX does not simply prohibit discrimination *by* the school district; it protects individuals from being subjected to discrimination "under" a funded program or activity. This language supports broader school district liability under Title IX than Title VII, which reaches only discrimination *by* employers and their agents, supports in the workplace.

Title IX is notable for the breadth of its language, on which the Court has had occasion to remark previously.[5] The statute has three distinct and specific clauses. Under Title IX, no person "shall, on the basis of sex, [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under any [federally funded] education program or activity. . . ." While the first two of those clauses would often result from official or quasi-official action by the school district itself, most discrimination — and all sexual harassment discrimination — is performed by some human actor, and almost always by some human actor below the managerial level. The text of Title IX

3. Respondent seeks to minimize the significance of *Franklin* by pointing to the plaintiff's allegation that the school district had actual knowledge of the harassment and failed to take remedial action. *See* Br. of Resp. at 27-28. But nothing in the Court's discussion of the Spending Clause issue alludes to this allegation or suggests that it was necessary to its conclusion, *Franklin*, 503 U.S. at 74-75; at most, one could surmise that the Court deemed a showing of actual knowledge to be *sufficient* to establish liability.

4. *See Franklin*, 503 U.S. at 74-75.

5. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

clearly aims to reach beyond official policies of exclusion or discrimination.

Moreover, Title IX, unlike Title VII, affects only entities that have accepted the benefits of federal funding. It should not be surprising that recipients of federal funds are required to undertake *broader* responsibility to prevent intentional discrimination within their programs than is imposed on essentially all employers through a comprehensive regulatory statute such as Title VII.[6]

Respondent argues that our construction of the statute is so broad as to impose "an impossible burden and one that Congress could not have intended . . ." Br. of Resp. at 13. But we did not draft and enact Title IX; Congress did. And as the Court observed quite recently, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . . ." *Brogan v. United States,* 118 S. Ct. 805, 811-12 (1998).

b. The purpose of Title IX would be defeated by Respondent's construction of the statute. If only intentional discrimination perpetrated by the school district gave rise to an action for damages under Title IX, the statute's private right of action against sexual harassment, upheld in *Franklin*, would be a dead letter.

Sexual harassment is never carried out by the school district itself, and almost never by the school district's managerial officials, who have little or no contact with students. Indeed, if only intentional discrimination by the school district, through responsible managerial officials, were actionable, damages would have been unavailable in *Franklin* itself,

6. Respondent's Spending Clause argument is premised on the assumption that liability under Spending Clause legislation must necessarily be narrower than liability under a regulatory statute such as Title VII. At the heart of the Court's Spending Clause jurisprudence, however, is the proposition that liability attaching to the receipt of federal funds is contractual in nature. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), thus held that any conditions on federal funding must be clearly stated. *Id.* at 17. But that being said, Congress can certainly choose to condition the benefits of federal funding on a higher standard of care toward the ultimate beneficiaries of that funding than, for example, is required of all employers regardless of their receipt of federal funds. The inescapably broader language of Title IX as compared to Title VII suggests that Congress did exactly that.

and would be unavailable in a case meeting the Fifth Circuit's actual notice standard. For knowing of discrimination and failing to remedy it is not the same as intentionally discriminating (though it is certainly allowing persons to be, "on the basis of sex, . . . subjected to discrimination"). An "equal opportunity ignorer" does not intentionally discriminate on the basis of sex.[7] So if Respondent's analysis were accepted, there would essentially never be liability for sexual harassment under Title IX. The Court's decision in *Franklin* requires that this interpretation be rejected.

c. Ironically, Respondent's attempt to render the "actual knowledge" standard more palatable demonstrates the error in its argument. Respondent implicitly recognizes that a true "actual knowledge" standard would set a ridiculously high threshold for school district liability. But we are not to worry, says Respondent: School district officials need not be actually aware of harassment, and then fail to act; they must only be actually aware of a *substantial risk* that harassment is taking place. *See* Br. of Resp. at 29. It is impossible, however, to characterize a school district's actions in such a case — ignoring a substantial risk that harassment is occurring — as "intentional discrimination"; its conduct would be at most "reckless" with respect to the underlying harassment. Under Respondent's Spending Clause argument, then, there could be no liability in such a case. But the problem lies not with Respondent's attempt to soften the "actual knowledge" standard; it lies in the misdirected effort to attach the "intentional discrimination" requirement to the school district's own conduct rather than to the underlying act of discrimination, as *Franklin* indicates we should do.

7. Even the highly restrictive standard of the Eleventh Circuit in *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 (11th Cir., Jan. 20, 1998), which held that "the superintendent or the board must have actual knowledge of the sexual harassment and then fail to take reasonable steps to end the abuse," *id.* at *4, would seem to fall short of requiring *intentional discrimination* by the school district. Thus, the logical implications of the "intentional discrimination by the school district" argument are perhaps only followed by *Rowinsky v. Bryan Independent School District,* 80 F.3d 1006 (5th Cir.), *cert. denied,* 117 S. Ct. 165 (1996), which held that a school district was liable under Title IX for peer harassment only if it treated discrimination complaints by girls differently than it treated complaints by boys. *Id.* at 1016.

II. WITHOUT THE ERRONEOUS PREMISE THAT DAMAGES ARE AVAILABLE ONLY FOR THE SCHOOL DISTRICT'S OWN INTENTIONAL DISCRIMINATION, THE FIFTH CIRCUIT'S ACTUAL NOTICE STANDARD OF SCHOOL DISTRICT LIABILITY FOR INTENTIONAL SEXUAL HARASSMENT IS INDEFENSIBLE.

Once we dismantle Respondent's Spending Clause argument, its defense of the "actual knowledge" standard collapses. Neither the language of the statute nor the Court's prior decision in *Franklin* can be read to support such a narrow standard of school district liability for intentional discrimination by teachers. Moreover, the actual knowledge standard would undermine the purposes of Title IX by establishing inadequate incentives to police against sexual harassment.

An "actual notice" standard creates no incentive for a school district to guard against sexual abuse by teachers because the school district could avoid liability by avoiding knowledge of harassment. Respondent essentially concedes this, but seeks to deflect the point by arguing that other laws — Section 1983 or state tort law — can be relied upon to provide proper incentives. Br. of Resp. at 31. But these alternate remedies are chimerical, as Respondent well knows. Under Section 1983, for example, a plaintiff must show that the school district manifested "deliberate indifference" toward the plaintiff's right to be free of harassment. *See, e.g., Doe v. Taylor Independent School District*, 15 F.3d 443, 445 (5th Cir.), *cert. denied*, 513 U.S. 815 (1994). The Texas Tort Claims Act absolutely immunizes school districts from tort liability except in cases involving motor vehicle accidents.[8] Neither of these laws do anything to encourage school districts to make themselves aware that sexual harassment is occurring.

But even aside from the high threshold set by these laws, it is Title IX that seeks to eliminate sex discrimination and sexual harassment in schools. It makes no sense to justify a toothless interpretation of Title IX by reference to other laws that were not specifically designed to address either sex discrimination or discrimination in schools and that apparently were not adequately addressing the problems that Title IX was meant to redress.

8. Tex. Civ. Practice & Rem. Code, § 101.051.

It is striking to compare the "actual notice" standard for school district liability for teacher harassment of school children with the "constructive notice" standard that the Fifth Circuit imposes under Title VII, and that Respondent acknowledges might be appropriate for employment discrimination claims under Title IX. Br. of Resp. at 18. Under Respondent's view of Title IX, school districts would have a broader responsibility and a greater incentive to protect their adult employees from harassment than they would have to protect minor school children from harassment and abuse. How can this be the proper interpretation of a statute that aims to ban sex discrimination in schools? We think it cannot be.[9]

III. A SCHOOL DISTRICT SHOULD BE LIABLE FOR ITS TEACHER'S INTENTIONAL SEXUAL HARASSMENT IF THE SCHOOL DISTRICT KNEW OR SHOULD HAVE KNOWN OF THE HARASSMENT OR FAILED TO AFFORD ADEQUATE PROCEDURES FOR THE PREVENTION, DISCOVERY, AND REDRESS OF HARASSMENT.

A. A school district should be liable, at a minimum, if responsible officials knew *or should have known* of harassment and failed to take appropriate steps to remedy it.[10] Several circuits have so held, contrary to the Fifth Circuit.[11] But this case raises the question whether a school

9. While putting most of its eggs in the Spending Clause basket, Respondent also seeks to justify an "actual notice" standard on functional grounds, arguing that any broader standard of liability will create its own bad incentives — that is, either to overmonitor teachers or to reject federal monies. We will address these contentions in Parts III and IV below.

10. As recited in our opening brief at 7-8, the evidence raises a material dispute of fact as to whether Respondent should have discovered Waldrop's harassment of Gebser. *See also* Br. for United States at 27-28. It might have discovered it by investigating the complaints that Waldrop's principal did receive, for those complaints stemmed from sexual innuendo in a class of two students, including Gebser. J.A. 90a-93a. As Gebser said, "I think that they should have noticed that he was spending way too much time with me. . . . In retrospect, I think that they — I mean, this should have been setting off sirens in their heads." J.A. 61a.

11. *See, e.g., Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe v. Claiborne County*, 103 F.3d 495, 513-14 (6th Cir. 1996); (Cont'd)

district that has failed to put in place procedures designed to bring to light incidents of harassment can escape liability by asserting its ignorance of the harassment.

Because sexual harassment in schools is invariably carried out not by top school officials but by those who have direct contact with students, the prevention of harassment depends heavily on the school district's maintenance of adequate procedures for the prevention and redress of harassment. This is why the Department of Education has long required school districts that receive federal funds to adopt and publicize to all their students a policy against sexual harassment and other discrimination and grievance procedures that would allow students, without fear of reprisals, to apprehend and report incidents of sexual discrimination and harassment to school officials. 34 C.F.R. § 106.9.

The failure to institute these long-required procedures constitutes a basic violation of the statutory duty to protect students from intentional discrimination under the educational program. A school district should thus be liable for its teacher's sexual harassment of students if it knew or should have known that the abuse was taking place *or if it failed to afford adequate procedures for the prevention, discovery, and redress of sexual harassment*, as long required by federal regulations as a condition of receiving federal funds. *See Kracunas v. Iona College*, 119 F.3d 80, 86 (2d Cir. 1997). An educational institution that has failed to abide by these clear conditions of federal funding should not be afforded a defense of ignorance.

There is ample evidence that Respondent failed to comply with the conditions of federal funding. Its brief refers to the existence of sexual harassment policies that, on a fair reading of Superintendent Collier's testimony, never saw the light of day. Collier's testimony indicates that no policy against sexual harassment, procedures for making a harassment complaint, or assurances against reprisals were ever communicated to teachers or students, or that she was even aware that this was required.[12]

(Cont'd)
Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

12. This was, according to Collier, "a campus issue" for which the Respondent school district took no responsibility. J.A. 72a. (Nor is there (Cont'd)

There is, at a minimum, a genuine dispute about these issues so as to make summary judgment inappropriate.

The fact that some resourceful parents complained to the principal when their daughters were subjected to Waldrop's inappropriate behavior is hardly evidence that there were adequate procedures in place. (And again, even if it were, it would succeed only in raising a material dispute for trial.) There is simply nothing to suggest that these parents were aware of any policy or procedure; they simply took action on their own. J.A. 90a-93a. Nor is there any indication that the principal was following any specified procedure; indeed, he failed to make any record of the complaint, or to report the complaint to Collier, the Title IX coordinator, until after Waldrop's arrest (J.A. 78a-82a); his "investigation" consisted of hearing Waldrop's denial of any offensive intent. J.A. 78a-80a. Obviously we do not suggest that the Court should resolve these factual issues; the point is that there is more than enough evidence to raise an issue for trial under this standard of liability.

Under the terms on which it received federal funds, Respondent was clearly required to maintain written policies and complaint procedures, and to publicize them to students. A school district that fails to comply with these clear and longstanding conditions on the receipt of federal funding should not be heard to object to liability for the intentional sexual misconduct of its teacher on the ground that it could not have known that harassment was taking place.[13] Yet that is essentially what Respondent seeks to do here.

(Cont'd)
any evidence that these required actions were taken at the campus level by the principal.) Indeed, Collier, who was at that time the Title IX coordinator for Respondent, revealed in her deposition that she was simply unaware of any Department of Education regulations requiring Respondent to maintain and disseminate to students a complaint procedure. J.A. 72a-73a.

13. *Cf. Meritor*, 477 U.S. at 73 ("Petitioner's contention that respondent's failure [to put it on notice of harassment] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward"). Nor should they be heard to claim, as Respondent does here, that these required procedures would not have been effective had they been in place, because the Petitioner would not have utilized them. *See infra* pp. 14-15.

B. Putting aside its half-hearted defense of the adequacy of its procedures, Respondent objects to liability based on the *in*adequacy of its procedures on three grounds: (1) failure to afford adequate procedures is at most negligent, and does not constitute intentional sex discrimination by the school district; (2) Department of Education regulations do not provide, and the school district was not on notice, that violation of those regulations would give rise to liability for damages; (3) any shortcomings in Respondent's grievance procedures made no difference because Petitioner knew that Waldrop's conduct was wrong but was determined to keep it secret.

Each of these objections fails, as we will demonstrate below. But before turning to these objections, it is worth noting one objection that Respondent does not make in relation to the "inadequate procedures" basis for liability: Respondent does not claim, and could not claim, that imposing liability on this basis will leave school districts defenseless against a flood of litigation. Whatever may be the reasonableness or the relevance of Respondent's fears about depleting school budgets or provoking recipients to refuse federal funds, neither of those concerns is implicated by the proposed procedural basis for school district liability. School districts can obviously avoid liability on this basis by complying with federal law and instituting adequate procedures.

1. Respondent's first objection — that liability for lack of procedures would be based on negligence, not intentional discrimination — falls with Respondent's Spending Clause argument: The failure to maintain adequate procedures — to publicize the policy against harassment, the nature of the conduct that is prohibited, the availability of a grievance procedure, and assurances against reprisals — may not itself constitute intentional sex discrimination. But that is, again, beside the point, for Petitioner suffered intentional sex discrimination at the hands of Respondent's agent, Waldrop. The question now is whether there is an adequate basis for holding Respondent liable for that discrimination. Respondent's failure to comply with federal regulations that are designed to afford victims of harassment the information and redress they need constitutes a violation of the conditions of federal funding and a failure to protect Gebser from intentional harassment by its agent under its programs. It is an entirely reasonable basis for liability under the statute.

2. Respondent's claim of "unfair surprise" is unconvincing. What is the source of Respondent's surprise? It cannot be the requirement to maintain and publicize procedures for dealing with complaints of discrimination; such requirements have been in place since 1975,[14] have been imposed as a condition of all federal funding received by Respondent since then, and have nonetheless been ignored. It cannot be the fact that individuals subjected to sex discrimination have a private cause of action against the school district for Title IX violations; the Court so ruled in *Cannon* in 1979. It cannot be that damages are available in private actions based on intentional discrimination, or that sexual harassment is a form of intentional discrimination for which damages are available under Title IX; this Court unanimously decided those questions in *Franklin* in February, 1992, before Waldrop crossed the line from inappropriate verbal approaches to sexual abuse.[15]

At bottom, Respondent's claim of surprise is this: It did not realize that its blatant disregard of the conditions of its federal funding — conditions designed to prevent, discover, and redress sexual harassment — could render it liable for a teacher's intentional sexual harassment of a minor student under its supervision and care — harassment which it failed to prevent, discover, or redress. In light of its acceptance of federal funds with clear conditions attached, Respondent must accept the consequences of its refusal to comply with its contractual obligations.

3. Respondent seeks to escape responsibility for its failure to establish adequate procedures by claiming that such procedures would have made no difference in this case. Petitioner cites evidence that Gebser knew that Waldrop's conduct was wrong but was unwilling to report him. *See* Br. of Resp. at 38-39. There are two problems with this argument: First, it ignores contrary evidence — evidence that creates at least a material dispute of fact — that Gebser would have availed herself of an avenue of redress had it been available when she needed it. *See, e.g.*, J.A. 56a-57a; 63a. Second, it injects a counterfactual inquiry that

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14. 40 Fed. Reg. 24,139 (1975).

15. Moreover, the *Franklin* decision simply applied the "normal presumption in favor of all appropriate remedies," *Franklin*, 503 U.S. at 74, and recognized that Congress had implicitly acknowledged the availability of damages under Title IX. *Id.* at 72; *see also id.* at 78 (Scalia, J., concurring in the judgment).

should simply not be relevant; Respondent should be, in effect, estopped from claiming that its wrongful omissions were harmless.

First, on the facts: There is evidence that, at some points in the abusive relationship between Waldrop and Gebser, Gebser was aware that Waldrop's conduct was wrong but was unwilling to come forward with a complaint. She was unwilling to do so because, once the misconduct escalated into a full-blown sexual "affair," Gebser felt "ashamed," "bewildered," "terrified," "depressed," and pressured by Waldrop to keep quiet about their conduct, J.A. 64a-65a, and because she perceived that she would be unable to have him as a teacher if she did not submit to his sexual impositions and keep them secret. J.A. 62a.

This evidence reinforces the extent to which Waldrop manipulated Gebser and used his authority as her teacher to accomplish and hide his harassment of her. But it does not remotely establish that adequate sexual harassment policies and procedures would have made no difference. For there is also evidence that, earlier in Waldrop's illicit sexual pursuit of Gebser, she was naive, uninformed about the nature of sexual harassment, and bewildered about what she should do about it. J.A. 57a-58a, 63a. She testified, "If I had known at the beginning what I was supposed to do when a teacher starts making sexual advances towards me, I probably would have reported it." J.A. 64a. Respondent did nothing to help Gebser to recognize Waldrop's illicit pattern of conduct, and to call him on it, before she was in thrall to him. At a minimum, there is a genuine dispute of fact as to whether adequate procedures would have made a difference in this case.

But Respondent's one-sided recitation of the facts serves to illustrate why this counterfactual inquiry should have no place in the determination of Respondent's liability. A young victim of sexual abuse may often be pressured, manipulated, and confused into silence. The procedures required by federal regulations are designed to cut short this dynamic of manipulation and to give the victim a way out before it is too late. Moreover, an effectively communicated policy against sexual harassment, along with a well-advertised complaint procedure, may well deter a teacher from engaging in inappropriate behavior. Respondent's failure to comply with those requirements inevitably creates uncertainty about whether appropriate procedures would have accomplished their

objectives; Respondent should not gain the benefit of that uncertainty.[16] *Having inexcusably failed to institute adequate procedures to prevent, discover, and redress sexual discrimination and harassment, Respondent should not be able escape responsibility for sexual harassment that it failed to prevent, discover, or redress.*

IV. A SCHOOL DISTRICT SHOULD BE LIABLE FOR ITS TEACHER'S INTENTIONAL SEXUAL HARASSMENT OF STUDENTS IF THE TEACHER WAS AIDED IN CARRYING OUT THE HARASSMENT BY THE AUTHORITY GRANTED TO HIM BY THE SCHOOL DISTRICT OVER THE STUDENT VICTIM.

A. Respondent apparently acknowledges that there is at least a material factual dispute on the critical role of the student-teacher relationship in enabling and sustaining the unlawful conduct. Respondent admits, for example, that "Gebser agreed to conceal the affair because she knew that she would no longer have Waldrop as a teacher if the relationship were exposed." Br. of Resp. at 4. Respondent makes no reference to Gebser's undisputed testimony that, while they never had sexual intercourse at the school, Walrop accosted Gebser, and arranged these incidents, at the school and during the school day, and that the cover for these incidents was Waldrop's role as her one-on-one advanced placement teacher in "psychology" or the like. J.A. 60a-61a. Waldrop was granted extraordinary one-on-one control, without any supervision or accountability, over Gebser's education. There is thus ample evidence that Waldrop was aided in carrying out his harassment of Gebser not only by the proximity to Gebser that followed from his

16. The Government contends for a constructive notice standard under which Respondent's lack of procedures would be highly relevant to the determination of whether Respondent knew or should have known of harassment. *See* Brief For The United States as *Amicus Curiae* Supporting Petitioners at pp. 16-17. This standard may open up the hypothetical inquiry sought by Respondent here, and may allow a school district to escape liability by eliciting damaging answers to "what if . . ." questions from the confused and guilt-ridden victim whom the school district failed to protect. We believe, along with the Second Circuit in *Kracunas, supra*, that it is more consistent with the statutory text and purpose to foreclose that inquiry in the case of a school district that has failed even to institute the required procedures.

teaching job, but by the extraordinary educational authority granted to him by the school district over Gebser.

Should liability attach to the principal when the unlawful conduct stems directly from the authority entrusted to the agent? We argue that it should, *not* because Title IX precisely parallels Title VII, in which agency standards apply, but because this particular common law agency standard, drawn from Restatement (Second) of Agency § 219(2)(d), resonates fully with the statutory language and purpose of Title IX: A teacher's intentional harassment of a minor school child that is carried out using the authority granted by the school district is intentional discrimination "under" a federally funded educational program.

As compared to the young victim, the school district has superior means of guarding against this sort of abuse of authority. The school district can screen employees, supervise them, give them incentives to abide by the law, and, most importantly, institute policies to prevent, uncover, and redress harassment. In view of the Respondent's failings on this score, its protests against what it claims will be open-ended and uncontrollable liability ring hollow. School districts should be given a strong incentive to police against teachers' abuse of their authority over students to carry out intentional harassment and other discrimination against them.

B. Respondent raises three basic objections to this standard of liability: (1) that the proposed standard of liability is broader than the standard of agency law in Restatement (Second) of Agency § 219(2)(d) from which it is derived; (2) that it amounts to the imposition of "strict liability"; and (3) that this so-called "strict liability" standard would expose school districts to a crippling flood of litigation and produce counterproductive incentives. None of these objections is valid.

1. Respondent contends that Restatement (Second) of Agency § 219(2)(d), even if it were an appropriate standard of liability under Title IX, would not support liability here. *See* Br. of Resp. at 40-42. According to Respondent, that provision is narrower than its words suggest; it reaches only cases in which "the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided in him." Restatement (Second) of Agency § 261 (cited in comment (e) to § 219(2)).

But the case in which "the transaction seems regular" is only one of several examples of apparent authority under § 219(2)(d). Comment (e) goes on to state: "The enumeration of such situations is not exhaustive, and is intended only to indicate the area within which a master may be subjected to liability for acts of his servants not in scope of employment." And in the manner of common law principles generally, this one has come to be used in new contexts — specifically, the context of harassment and discrimination, in which § 219(2)(d) has frequently been found to justify enterprise liability for harassment by one of its agents.[17]

But more to the point, even if the school district would not be liable for Waldrop's conduct under a strict application of the common law of agency, that is hardly a decisive argument against imposing Title IX liability under a similar standard. Even under Title VII, which explicitly invokes the agency concept, the Court has acknowledged that "common-law principles [of agency] may not be transferable in all their particulars to Title VII." *Meritor*, 477 U.S. at 72. Even more so under Title IX, the question is what standard of liability — and what level of accountability — is appropriate under the statute.

As we set forth in our opening brief, the text and context of Title IX support holding school districts broadly liable for their teachers' abuse of authority in a case like this, in which a minor schoolchild was harassed by a teacher whom the Respondent put in charge of important parts of her education. "Abuse of authority" would not be a basis for liability in all cases of harassment by a school district agent; where the agency relation merely brought the perpetrator into contact with the victim, there would be no basis for school district liability under this principle. Similarly, this principle would rarely afford a basis for liability in the case of peer harassment. But in a case such as this, where the

17. *See, e.g., Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d. Cir. 1994), *cert. denied*, 512 U.S. 1213 (1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417, 1418 (10th Cir. 1987), *appeal after remand*, 928 F.2d 966 (1991); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558, 1559 (11th Cir. 1987); *Webb v. Hyman*, 861 F. Supp. 1094, 1108 (D.D.C. 1994); *Sims v. Montgomery County Comm'n*, 766 F. Supp. 1052, 1069, 1075, 1094 (M.D. Ala. 1990); *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916, 924 (D. Conn. 1989); *Rauh v. Coyne*, 744 F. Supp. 1186, 1189-91 (D.D.C. 1990); *Champion v. Nationwide Sec., Inc.*, 450 Mich. 702, 545 N.W. 2d 596, 601 (1996).

school district's agent has been given extraordinary, unsupervised educational or disciplinary authority over the victim, and has been thereby aided in carrying out the harassment, the school district should be liable.

2. Respondent misses the mark when it characterizes the proposed standard as amounting to "strict liability." *See* Br. for Resp. at 44. Strict liability is liability without fault — liability that is imposed on a party regardless of fault for reasons of social policy. But there is no shortage of fault in this case. There is the blameworthy, intentional misconduct of Respondent's agent, Waldrop. Moreover, Respondent is hardly blameless in having placed Waldrop a position of extraordinary authority over Gebser, and enabled him to isolate the victim under cover of a one-pupil class. It is not "strict liability" to hold Respondent responsible for having thus aided Waldrop in perpetrating his escalating campaign of harassment.

3. In the final analysis, Respondent's argument against this agency standard issues from the last refuge of those seeking to restrict liability: when all else fails, point to the "floodgates," and the deluge of litigation that supposedly lies behind them. Respondent adds a twist: faced with a potential flood of costly litigation, school districts may reasonably respond in one of two harmful ways: They may decline federal funds, to the detriment of their pupils' education and of the statutory objective of combatting sex discrimination, in order to avoid Title IX liability entirely; or they may engage in intrusive and excessive oversight of teacher-student interaction in order to insure against improper conduct. *See* Br. of Resp. at 46-48.

Respondent's dire predictions rest on an entirely speculative claim about the likely volume of litigation concerning claims of teacher sexual abuse. No support is offered for these predictions.[18] Moreover, it is unable to point to a single decision in which a judgment of any size, much less one of ruinous proportion, was entered against a school district.[19] Indeed, there are many means of legal recourse against an

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18. *See Doe v. University of Illinois*, Nos. 96-3511 and 96-4148, 1998 U.S. App. LEXIS 3881 (7th Cir., March 3, 1998), slip op. at 25.

19. Respondent seeks to create the impression of open floodgates by its citation to *Canutillo Independent School District v. Leija*, 101 F.3d (Cont'd)

inappropriately large verdict, if one should be rendered.[20]

More importantly, Respondent's predictions rest on the assumption that school districts have no reasonable and effective means to prevent or address teacher harassment of students, and thus to avoid liability, at least under the agency standard.[21] But this assumption — essentially that the procedures that the federal government has long required and that conscientious school districts have long relied upon to prevent and redress harassment will not work, or will not work reliably enough — is entirely speculative. Certainly Respondent is in a poor position to assess the utility of reasonable procedures for the prevention, uncovering, and redress of harassment, for it had no such procedures.

Finally, in case school districts' conscientious enforcement of required procedures fails to prevent harassment, and in case their appeals to the judiciary fail to stem the tidal wave of damages that Respondent and its *amici* profess to fear, school districts can always turn to Congress. Congress has the power to limit damage recoveries, and has done so under other civil rights statutes. Thus, for example, actions arising under Title VII and the Americans with Disabilities Act[22] have damage "caps" that are finely calibrated, so that small companies are exposed to a

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(Cont'd)
393 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997), which indeed involved a large verdict, but it fails to note that in *Canutillo* the district judge refused to enter a judgment on that verdict.

20. A district judge may simply refuse to enter a verdict and order a new trial, as was done in *Canutillo*, *supra*. A district judge is empowered to order a remittitur. If those protections are inadequate, a litigant may appeal and the circuit courts are empowered to order new trials or remittiturs. *See, e.g., Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176 (5th Cir. 1995); *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983).

21. As noted above, the "floodgates" argument has no force against the modified constructive notice standard discussed above; the maintenance and use of adequate procedures will not only accomplish its central aim of preventing and redressing harassment; it will shield the school district from liability for harassment of which it neither knew nor should have known.

22. 42 U.S.C.A. § 12101.

maximum of $50,000 in nonpecuniary and exemplary damages, and the largest companies are exposed to a maximum of $300,000,[23] pursuant to the Civil Rights Act of 1991.

Respondents in *Cannon* made a similar "floodgates" argument against the recognition of an implied private cause of action under Title IX. *Cannon*, 441 U.S. at 709. The Court's answer is pertinent here:

> In short, respondents' principal contention is not a legal argument at all; it addresses a policy issue that Congress has already resolved.
>
> History has borne out the judgment of Congress. Although victims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965, . . . respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened. Nothing but speculation supports the argument that university administrators will be concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner.

Id. at 709-10. Respondent's argument here, too, is best directed to Congress. The speculative fear of costly litigation and liability is simply not a reason to cripple the effectiveness of Title IX as a remedy for sexual harassment by adopting a threshold of liability that will virtually never be met.

CONCLUSION

For the reasons set forth above and in our opening brief, Petitioners respectfully request that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and that the case be remanded to the district court for further proceedings.

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23. 42 U.S.C.A. § 1981(b)(3)(A)-(D).

Respectfully submitted,

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No. 96-1866

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALIDA STAR GEBSER AND ALIDA JEAN MCCULLOUGH,
PETITIONERS

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals adopted the correct legal standard to determine when a school district may be liable in damages, under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, to a student who was sexually harassed by one of the district's teachers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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INTEREST OF THE UNITED STATES

The United States Department of Education administers federal financial assistance to education programs and activities and is authorized by Congress to effectuate Title IX in those programs and activities. 20 U.S.C. 1682. Pursuant to that authority, the Department, through its Office of Civil Rights (OCR), has promulgated regulations, a policy memorandum, and a policy guidance based on its longstanding interpretation of school district liability under Title IX. The Department of Justice enforces Title IX in federal court in cases referred to it by OCR.

STATEMENT

1. a. In the spring of 1991, petitioner Alida Star Gebser was a thirteen-year-old eighth-grade student at the middle

school in respondent school district. Pet. App. 12a.[1] She was in the program for gifted and talented children. Because Gebser "needed a more challenging academic program," her teacher arranged for Gebser to join the high school great books discussion group led by her husband, Frank Waldrop, a teacher at the district high school. *Ibid.*; J.A. 51a. During the book group discussions, Waldrop often made suggestive comments and jokes. Pltf. Mot. for Partial Summ. Jdgmt., Exh. 1 (Gebser Dep.), at 26-27.

In the fall of 1991, Gebser entered the district high school and was assigned to a small social studies class taught by Waldrop. Gebser Dep. 25, 28-29. Waldrop continued to make the same type of comments. For example, he suggested that one of the students had engaged in sex with her boyfriend in a hotel room and, when the girl took offense, expressed his belief that of all the girls he knew, she was the girl most likely to be a virgin. *Id.* at 29-30. Waldrop directed his sexual comments toward female students, sometimes in front of other students and teachers. *Id.* at 38-39. Waldrop also made inappropriately suggestive comments to Gebser individually and, in doing so, implied that he considered her "very nearly a peer and that he expected [her] to act that way." *Id.* at 42-44.

In the spring semester of 1992, Gebser was also assigned to Waldrop's class; for approximately 75% of the time, she was the only student in the classroom with Waldrop, because the other two students spent most of the class time working in the computer lab and library. Gebser Dep. 44-45. Although respondent school district is small, it was unusual to have just one student in a high

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[1] Because the case comes to the Court from a grant of summary judgment in respondent's favor, we state the facts in the light most favorable to petitioners, as disputed facts should be resolved against respondent. *General Electric Co.* v. *Joiner*, 118 S. Ct. 512 (1997).

school class alone with one teacher most of the time. *Id.* at 46. Waldrop continued to make suggestive comments to Gebser, *id.* at 45-46, and eventually he initiated sexual contact when, "[k]nowing she would be alone, he visited [Gebser at home] under the pretext of returning a book" she needed for a research project for school. Pet. App. 12a. Waldrop embraced Gebser, kissed her, fondled her breasts, unzipped her pants and fondled her genitalia, and told her that he loved her. J.A. 54a-55a. Gebser asked Waldrop repeatedly about his young son, whom Waldrop had left out in the car, and Waldrop eventually left. J.A. 55a.

The sexual assault by her teacher terrified Gebser. J.A. 56a. Gebser testified that she "had believed" in Waldrop, who "was basically [her] mentor," that he "was the main teacher at the school with whom [she] had discussions," that he was the person in the school system whom she "most trusted," and that she "didn't know what to do" because he was the person against whom she had a complaint. J.A. 57a, 63a. The only exposure she had had "to anything like that to even have the concept that that could happen was * * * references on TV and stuff about female students marrying their professors." J.A. 57a. She "had no idea that that stuff actually happened." *Ibid.* Gebser wanted someone to help her figure out what she should do, and she told one male friend who was also a high school student. J.A. 58a. He advised against a relationship, but did not suggest that Gebser report the incident. Gebser Dep. 56-57. Gebser testified that if, at the beginning, she had known what she was supposed to do when a teacher started making sexual advances to her, she "would have reported it." J.A. 65a.

Waldrop escalated his advances toward Gebser and, later that semester, engaged in sexual intercourse with her. J.A. 59a-60a. He had sex with her on other occasions during the rest of her freshman year. J.A. 60a. That summer, Gebser was the only student in Waldrop's advanced

placement class, and he often used the weekly class time to engage in sexual intercourse with her. *Ibid.* Waldrop would pick up Gebser from her home and make comments about studying psychology, which both Gebser and Waldrop understood really meant having sexual intercourse. *Ibid.*

In the fall of 1992, Gebser returned for her sophomore year and again had Waldrop as a teacher. J.A. 60a-61a. Waldrop would call Gebser aside as she was leaving the classroom or walking in the hall and ask if she could "study psychology that day," and she "basically just went along with what he said." J.A. 61a. Gebser testified that it seemed to her that the sexual relationship now "was a necessary component" of the intellectual relationship and that, if she were "to blow the whistle on [the sexual relationship]," then she wouldn't be able to have Waldrop as a teacher anymore, which was her main interest in the relationship. J.A. 62a. Gebser testified that she was ashamed of the sexual relationship and felt that, by trying to act like an adult in response to Waldrop's comments, she had led him on and had to go along with it. *Ibid.* Waldrop told Gebser that if the sexual relationship were discovered, he could lose his job and they would both be in trouble. Gebser Dep. 75. Gebser decided that she would graduate a year early "because it seemed to [her] that that would be a way that without being discovered, * * * [she] could get out of it without having his disapproval." J.A. 64a.

In October 1992, other high school girls complained to the school about Waldrop. One of the girls refused to stay after school when she discovered that Waldrop was on duty. The girl did not want to risk being the only student in the classroom with Waldrop. J.A. 89a. She explained to her parents that the way he looked her up and down made her uncomfortable and that he had made suggestive comments to female students. When the girl's mother asked her other daughter and her daughter's friend, who lived

with the family, about Waldrop, they also said that he made them uncomfortable. J.A. 85a-91a. The friend explained that she had been in a class (with Gebser) taught by Waldrop and that he had spent most of the class time in conversation, much of which had sexual connotations, and told off-color jokes that made her uncomfortable. J.A. 90a.

The other girls' parents called the high school principal and complained about Waldrop's conduct. J.A. 91a. The principal arranged a meeting in his office with the parents and Waldrop during which the parents relayed the girls' complaints. J.A. 79a. According to the principal, Waldrop never denied making the comments, but indicated that he did not think anything he had said was offensive; he then apologized and said it would not happen again. *Ibid.*[2] The principal told Waldrop that he should be careful to avoid making remarks that could be construed as offensive, but he did not say the remarks were improper. J.A. 80a-81a. The principal, who was new to the district that semester, did not note the complaint or meeting in Waldrop's personnel file and did not know whether the preceding principal had had any similar meetings with Waldrop. J.A. 81a-82a; Pltf. Mot. for Partial Summ. Jdgmt., Exh. 3 (Riggs Dep.), at 33, 35, 41. The principal told the school guidance counselor about the conference at that time, but he did not inform the Title IX coordinator (the district superintendent) about the complaint until after Waldrop's sexual abuse of Gebser came to light. Riggs Dep. 32, 36-37, 39-40.[3]

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[2] The complaining parents testified that Waldrop flatly denied the accusations, thought the girls were lying, and "didn't know why they would lie about that." J.A. 93a.

[3] One of the girls had complained to another teacher about Mr. Waldrop's telling dirty jokes and making remarks with sexual connotations, but that teacher did not believe her and "every time she told [him] about something, he told her that she must be misunderstanding

A few months later, in January 1993, a police officer discovered Waldrop and Gebser engaged in sexual intercourse and arrested Waldrop. Pet. App. 12a. The school district terminated Waldrop's employment, and the State ultimately withdrew his teaching license. Riggs Dep. 43-44.[4]

b. Throughout the period in which Waldrop was sexually abusing Gebser, the school district's Title IX coordinator was the school district superintendent. J.A. 69a. According to the superintendent, a student who felt she had been victimized by sexual harassment should have complained directly to the school principal. J.A. 71a-72a. The superintendent was not aware, however, of any communication that informed students that they should go to the principal with such a complaint. J.A. 72a. The superintendent believed that it was a "campus issue" and "would have expected it to be addressed by the principals." *Ibid.* The superintendent was not aware that Title IX's implementing regulations require that a recipient of federal funds have a grievance system for sexual discrimination claims and that the students be informed about that system. J.A. 73a. The superintendent testified that the district did not have any established policy that would have governed how it responded to reports that a teacher might be engaging in sexually abusive or harassing behavior with a student. Pltf. Mot. for Partial Summ. Jdgmt., Exh.

Mr. Waldrop's intentions and what was said." Pltf. Resp. to Def. Mot. for Summ. Jdgmt., Exh. A (Tully Dep.) 42-45.

[4] When the parents who had complained about Waldrop learned that the principal had not reported their earlier complaints to the district superintendent, they notified a school board member about their complaints and were told that they were "not the only parent[s] [who] had complained." Tully Dep. 20. The school board member explained: "We've had many complaints from other parents complaining of Waldrop's abusive treatment of students. And we just haven't been able to catch him until now." Tully Dep. 20. See also Gebser Dep. 33-35.

2 (Collier Dep.), at 42. The district's informal policy would have been to investigate the matter immediately and completely, including talking with the teacher, "other students who might have been witness to this, anyone that the parent referred you to that could substantiate the charge, the student." *Id.* at 43-45. If any of the alleged comments or conduct occurred in front of other persons, talking with the teacher would not be adequate, and the investigation "would go beyond the teacher's statement." *Id.* at 45.[5]

2. Gebser's mother filed the instant action in state court, on behalf of her daughter, who was then still a minor, and on her own behalf. Respondent removed the action to federal district court. In their second amended complaint, petitioners alleged, *inter alia*, that respondent had vio-lated Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (Title IX). Pet. App. 1a. Respondent moved for summary judgment on all claims, and petitioners moved for summary judgment on the Title IX claim. Pet. App. 1a-2a.

The district court denied petitioners' motion and granted respondent's motion. Pet. App. 1a-10a.[6] Reasoning that respondent could be held liable only for a policy of discrimination in its federally funded education programs, the court held that "[o]nly if school administrators have some type of notice of the gender discrimination and fail to

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[5] Respondent later submitted an affidavit of the superintendent that is inconsistent with the superintendent's deposition and suggests that respondent had a written sexual harassment policy. See J.A. 43a-47a. That submission raises a disputed issue of fact and, in any event, does not contradict the evidence that no Title IX policy or grievance procedure was ever communicated to the students.

[6] Petitioners also raised claims based on 42 U.S.C. 1983 and common law negligence; the court entered summary judgment for respondent on those claims as well. Pet. App. 2a-5a. In this Court, petitioners have raised only their Title IX claims.

respond in good faith can the discrimination be interpreted as a policy of the school district." *Id.* at 6a-7a (emphasis omitted). The court ruled that, "in order to prevail on a Title IX cause of action for personal injuries and damages, a plaintiff must show the school district had actual or constructive notice of the nature or type of the discrimination alleged by a plaintiff or notice of circumstances which indicate a strong potential for the type of discrimination alleged by the plaintiff." *Ibid.* The court then characterized petitioners' evidence regarding notice as only a "complaint about offensive remarks made during class" that was not sufficient to establish a genuine issue of material fact as to respondent's actual or constructive notice of Waldrop's sexually discriminatory conduct. *Id.* at 9a.

3. The court of appeals affirmed (Pet. App. 11a-18a), based on two Title IX cases it had recently decided. *Id.* at 12a (citing *Rosa H.* v. *San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); *Canutillo Indep. Sch. Dist.* v. *Leija*, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997)). First, the court rejected imposition of strict liability on the school district in teacher-student sexual harassment cases because it "is not part of the Title IX contract." *Id.* at 14a. Second, the court rejected liability based on constructive notice because "there is not enough evidence for a jury to conclude that a Lago Vista school official should have known about the abuse"; in the court's view, the complaint about Waldrop's inappropriate remarks to students "did not concern [Gebser] and gave officials no reason to think that Waldrop would have sex with a student." *Ibid.* Third, the court rejected liability based on agency principles because "a common-law agency theory would permit courts to use [Restatement (Second) of Agency] § 219(2)(d) [(1958)] and that * * * section would generate vicarious liability in virtually every case of teacher-student harassment." *Id.* at 15a. The court held

that "school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." *Ibid.*

SUMMARY OF ARGUMENT

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court indicated that, in Title IX cases involving teacher-student harassment, courts should look to agency principles developed in Title VII cases involving supervisor harassment. The Department of Education has reasonably applied agency principles under Title IX in a manner consistent with the particular circumstances of the school setting. The Department interprets Title IX to hold a federal fund recipient responsible for harassment of students by a teacher if (a) the teacher was aided in accomplishing the harassment by his agency relationship with the recipient or his apparent authority; or (b) the recipient knew or should have known of the harassment and failed to take immediate and appropriate action to remedy the situation. Highly relevant to that determination is whether the recipient has complied with the longstanding regulatory mandate that it adopt a policy against sex discrimination and an effective grievance procedure for such complaints, including complaints of sexual harassment, and that that policy and procedure be communicated to students and employees.

Agency principles apply in Title IX cases in much the same manner as in Title VII cases, although there are relevant differences between the situation presented by a student in an elementary or secondary school and an adult in the workplace. School administrators and teachers, acting *in loco parentis*, have substantially more authority and control over elementary and secondary students than

employers have over employees; attendance is mandatory; schools have duties to young children that do not apply in the workplace; the teacher-student relationship provides teachers with unusual influence; and the emotional, sexual, and intellectual immaturity of children makes them more vulnerable than adults to sexual harassment.

The court of appeals' view that liability can be imposed on a school district only if the harassing teacher's supervisor actually knew of the harassment cannot be reconciled with this Court's holding in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986), that lack of notice does not insulate an employer from liability for a supervisor's harassment of an employee. The standard applicable under Title IX should be at least equally protective of children victimized by sexual harassment by teachers. The court of appeals misread *Franklin* as precluding damages in this case. The Court held in *Franklin* that sexual harassment cases under Title IX involve intentional discrimination and that therefore the normal presumption in favor of all appropriate remedies, including damages, applies.

Judged under the proper legal standards, the evidence in this case raises issues of material fact that preclude entry of summary judgment for respondent. The court of appeals' judgment should therefore be vacated and the case remanded for further proceedings.

ARGUMENT

THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD TO DETERMINE WHETHER RESPONDENT SCHOOL DISTRICT COULD BE LIABLE FOR DAMAGES, UNDER TITLE IX, TO A STUDENT WHO WAS SEXUALLY HARASSED BY ONE OF RESPONDENT'S TEACHERS

A. There Is A Basis For A School District's Liability For Damages Under Title IX For Teacher-Student Sexual Harassment When The Teacher Is Aided In The Harassment By His Agency Relationship With The School District Or Uses His Apparent Authority, Or When The District Knew or Should Have Known About the Harassment And Failed To Take Appropriate Corrective Action

1. a. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that money damages remedy would be available, under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, upon a sufficient showing by a high school student who had been sexually harassed by one of the district's teachers. In holding that a damages remedy against a school district is authorized in such a case, the Court declared:

> Unquestionably, Title IX placed on [the school district] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

503 U.S. at 75. In *Vinson*, the Court held that hostile environment sexual harassment is a form of sex dis-

crimination that is actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and that the determination of employer liability for harassment of an employee by a supervisor should be guided by agency principles. 477 U.S. at 72. Citing Restatement (Second) of Agency [hereinafter Restatement] §§ 219-237 (1958), the Court made clear that, under such principles, employers are not always liable for sexual harassment by their superiors, but that "absence of notice to an employer does not necessarily insulate that employer from liability." *Vinson*, 477 U.S. at 72.[7]

b. In light of *Franklin* and *Vinson*, agency principles and Title VII case law are appropriate guides for determining school district liability for harassment of a student by a teacher in a hostile environment sexual harassment case.[8] Accordingly, the Department of Education relies

[7] Under general principles of agency law, the master is liable for torts committed by his servants while acting in the scope of employment. Restatement § 219(1), at 481. When the servant acts outside the scope of his employment, the master is liable if (a) "the master intended the conduct or the consequences," (b) "the master was negligent or reckless," (c) "the conduct violated a non-delegable duty of the master," or (d) "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.* § 219(2).

We discuss more fully the application of agency principles in Title VII cases in our brief in *Faragher* v. *City of Boca Raton*, cert. granted, No. 97-282 (Nov. 14, 1997). We have furnished a copy of our *Faragher* brief to the parties in this case.

[8] Several courts have looked to agency principles and/or Title VII law in determining a recipient's liability under Title IX. See, *e.g.*, *Kracunas* v. *Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe* v. *Claiborne County*, 103 F.3d 495, 513-514 (6th Cir. 1996); *Kinman* v. *Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Murray* v. *New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995); see *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881, 900 (1st Cir. 1988);

on such legal authorities in its interpretation of Title IX. That interpretation is reasonable, consistent with the text and purpose of Title IX, and entitled to judicial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996); see *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522 n.12 (1982).[9]

The Department has issued a 1981 policy memorandum and a 1997 policy guidance addressing Title IX and sexual harassment.[10] The 1981 policy memorandum cites Title VII case law and the Title VII sexual harassment guidelines of the Equal Employment Opportunity Commission (EEOC) to support its interpretation of Title IX to cover sexual harassment claims. Dep't of Educ. Policy Memorandum from Antonio J. Califa to Regional Civil Rights Directors (Memorandum) at 2, 6, Tabs B, C (Aug. 31, 1981). It discusses agency principles to explain that, "[i]n some situations, a recipient may be liable under Title IX for the sexual harassment acts of one student perpetrated upon another student under an agency/principal theory," because where the institution receiving funds "has delegated some responsibility to a student to act in an authori-

Mabry v. *State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 317 (10th Cir.), cert. denied, 484 U.S. 849 (1987). The Seventh Circuit has followed the Fifth Circuit in refusing to apply Title VII agency principles under Title IX and refused to defer to the Department's Guidance. *Smith* v. *Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014 (1997).

[9] Under Title IX, Congress empowered federal funding agencies to effectuate the prohibition against sex discrimination. As a provider of such funds, the Department, as the ultimate sanction, may terminate federal funding if "compliance cannot be secured by voluntary means." 20 U.S.C. 1682. The Department is vested with the authority to promulgate rules, regulations, and orders to gain compliance by recipients. *Ibid.*

[10] For the convenience of the Court, we have lodged copies of both of these documents with the Clerk.

tative position with respect to another student, the institution is responsible for the acts of that student acting in the delegated capacity." *Id.* at 7. In other words, when a teaching assistant uses his agency authority in sexually harassing a student, "the recipient institution would have responsibility under Title IX for those acts." *Ibid.* The necessary premise of that interpretation is that a recipient institution would be responsible under Title IX for sexual harassment of a student by a teacher employee wielding authority over the student that is delegated to him by the institution.

The Department's 1997 policy guidance more specifically places the question of school district responsibility under Title IX for teacher-student sexual harassment within the framework of agency principles and Title VII case law. Dep't of Educ., Office of Civil Rights (OCR), Sexual Harassment Policy Guidance (Guidance), 62 Fed. Reg. 12,034, 12,039, 12,047 n.18 (1997). Consistent with those principles, when a "teacher or other employee uses the authority he or she is given (e.g., to assign grades) to force a student to submit to sexual demands, the employee 'stands in the shoes' of the school and the school will be responsible for the use of its authority by the employee or agent." 62 Fed. Reg. at 12,039. Thus, a Title IX recipient school district should be liable for quid pro quo harassment by its teachers, whether or not it had notice or approved of the harassment. *Id.* at 12,039, 12,047 n.19 (citing *Vinson*, 477 U.S. at 70). Similarly, a recipient school district should be liable for severe, persistent, or pervasive, hostile environment sexual harassment by its teacher or other employee if that person "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." *Id.* at 12,039, 12,048 & nn. 22-24 (citing, *inter alia*, Restatement § 219(2)(d), EEOC Policy Guidance and Title VII cases). For example, a teacher who sexually harasses his student

by requiring the student to stay after class under the guise of a disciplinary sanction is aided in carrying out that harassment by the authority the district conferred on him. Liability may also be imputed to the school district if, "because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority." 62 Fed. Reg. at 12,039, 12,048 n.22 (citing Restatement § 219(2)(d)). For example, a security employee may reasonably be perceived by very young students as acting with the authority of the educational institution although the actual delegation of authority to him may be very limited.

Thus, consistent with *Vinson*, school districts will not always be liable for sexual harassment by teachers and administrators. Where the district has not had notice of, and an opportunity to remedy, the hostile environment, liability under Title IX should depend on factors such as the extent of the delegation of actual authority to the employee, the effectiveness of the school's grievance procedure (see pp. 15-18, *infra*), and the age of the student (because the younger a student is, the more likely he or she would reasonably consider any adult employee to be in a position of authority). See 62 Fed. Reg. at 12,039. Of necessity, this is a fact-dependent inquiry.

Whether or not an employee's misconduct is aided by the use of actual or apparent authority, a school district should be liable for sexual harassment by an employee if "an agent or responsible employee of the school" knew or should have known of an existing hostile environment and the school failed to take immediate and appropriate steps to remedy that harassment. 62 Fed. Reg. at 12,039, 12,048 n.28 (citing Restatement § 219(2)(b)); *id.* at 12,050 n.63.[11]

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[11] This is the standard the Department applies in cases involving student-on-student sexual harassment. 62 Fed. Reg. at 12,039. A petition for a writ of certiorari presenting the question of Title IX's ap-

Notice to "an agent or responsible employee of the school" serves as notice to the school. *Ibid.* Under this theory, the school should be held liable for "its own discrimination in failing to remedy [the harassment] once the school has notice." *Id.* at 12,040. It does not "necessarily require that the employee who receives notice of the harassment also be responsible for taking appropriate steps to end the harassment or prevent its recurrence," so long as the employee has a duty "to report the harassment to other school officials who have [such] responsibility." *Id.* at 12,037. Cf. *Younger* v. *Bayer Corp.*, 123 F.3d 672, 674-675 (7th Cir. 1997). This principle is important in the school setting where, as we explain below (see p. 21, *infra*), teachers are required by law to report sexual harassment that rises to the level of suspected child abuse. Constructive notice of the harassment depends on whether the district exercised reasonable care given all the circumstances of the case. This includes, for example, whether known incidents of harassment "should have triggered an investigation that would have led to a discovery of the additional incidents." 62 Fed. Reg. at 12,042. In some cases, the pervasiveness of the harassment itself may be enough to establish constructive notice. *Id.* at 12,042, 12,050 n.64 (citing Title VII cases).

An important factor in the determination of school district liability under these agency principles is whether the district has an effective policy against sex discrimination and a grievance procedure for such complaints, including sexual harassment complaints, and has communicated those policies and procedures to its students.[12] "[W]ithout

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plicability to such peer sexual harassment is currently pending before the Court. *Davis* v. *Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir.), petition for cert. pending, No. 97-843 (filed Nov. 19, 1997).

[12] Since 1975, Title IX fund recipients have been mandated by regulation to have such a policy that is disseminated to their students,

a policy and procedure, a student does not know either of the school's interest in preventing this form of discrimination or how to report harassment so that it can be remedied." 62 Fed. Reg. at 12,040.

That is especially true in the elementary and secondary school settings. Unlike the employment context, where employees are more likely to be aware that there are levels of management higher than their direct supervisors from whom they can seek recourse, schoolchildren tend to interact exclusively with their classroom teachers and often may not understand the district's channels of authority. It is the classroom teacher through whom a school district generally acts in day-to-day relations with its students, not the school principal or school board members. See *Ambach* v. *Norwick*, 441 U.S. 68, 81-82 n.15 (1979). And, due to their intellectual, emotional, and sexual immaturity, elementary and secondary school students are substantially more vulnerable, especially to sexual harassment, than are most adult employees. See *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 & n.11 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). See also, *e.g.*, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 272 (1988); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 (1985); *Ingraham* v. *Wright*, 430 U.S. 651, 662 (1977).

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to identify a Title IX coordinator and inform students about how to contact that person, to adopt a grievance procedure for prompt and equitable resolution of sex discrimination complaints, and to publish that procedure. 34 C.F.R. 106.8, 106.9; see 40 Fed. Reg. 24,139 (1975). A separate policy and procedure for sexual harassment is not required so long as a school's "nondiscrimination policy and grievance procedures for handling discrimination complaints * * * provide effective means for preventing and responding to sexual harassment." 62 Fed. Reg. at 12,040, 12,044-12,045 (discussing features of effective grievance procedures).

Thus, in the absence of a known policy and procedure, it is more likely that a teacher would be aided by actual or apparent authority in sexually harassing a student. For example, if a child has not been told by the school what to do if he or she is touched in an inappropriate manner by anyone at school, including a teacher, it is more likely that a teacher would be aided by his authority in sexually harassing the child. The fact that a school does not have a meaningful policy and grievance procedure for sexual harassment complaints may create or contribute to the appearance of authority of school employees to harass students. See 62 Fed. Reg. at 12,040, 12,048 n.33 (citing EEOC Policy Guidance). Moreover, the absence of an effective policy and procedure can prevent the school from learning of incidents of harassment about which the school should have known—and on that basis can contribute to a finding of liability. 62 Fed. Reg. at 12,040. This case may be an example of that because there is evidence that respondent did not communicate to its students that they should report sexual harassment without fear of adverse consequences and that Gebser, if she had known what to do, would have reported it.

2. As *Franklin* suggests, the principles of agency liability for sexual harassment apply under Title IX just as they do under Title VII. As the Court indicated in *Vinson*, however, application of common-law principles of agency should take into account the particulars of the pertinent statute. See 477 U.S. at 72 (noting that common-law agency principles "may not be transferable in all their particulars to Title VII"). The text of Title IX and a school's power over and duties to students suggest a broad scope for vicarious liability in the elementary and secondary school setting.

a. Title IX is cast in very broad terms and is not limited, as is Title VII, to particular actors (employers)

and their agents. Title IX imposes, as a condition on receipt of federal funds, the blanket prohibition that

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]

20 U.S.C. 1681. Congress did not limit the nondiscrimination mandate to conduct engaged in "by" the recipient or its agents, but rather extended it to any "exclu[sion] from participation in," "deni[al of] the benefits of," or "subject[ion] to discrimination under," any federal fund recipient's educational programs or activities.[13] In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the Court recognized that Congress drafted Title IX "with an unmistakable focus on the benefited class," and did not "writ[e] it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." 441 U.S. at 691-693; see also *id.* at 693 & n.14.

b. School settings and teacher-student relationships are governed by principles that differ from those governing adult workplaces and supervisor-employee relationships. Schools and their teachers wield much greater control and authority over students than employers and supervisors typically do over employees. "Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). "Traditionally at com-

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[13] Compare 20 U.S.C. 1684 (contemporaneously enacted Title IX provision provides that no person shall be denied admission to a course of study "by" a federal fund recipient based on impaired vision).

mon law, and still today," with regard to unemancipated minors, school teachers and administrators "stand *in loco parentis* over the children entrusted to them," exercising delegated authority from parents over their children. *Vernonia Sch. Dist.* v. *Acton*, 515 U.S. 646, 654-655 (1995).[14] That delegated parental authority is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. A school teacher's authority over a student may even extend beyond the limits desired by the student's parents. See *Ingraham*, 430 U.S. at 662-663 & nn.22, 24 (state authorization of corporal punishment of student without parental approval not unconstitutional); cf. *Schall* v. *Martin*, 467 U.S. 253, 265 (1984).

Teachers and school administrators owe duties to students not owed by employers to employees. "Children, by definition, are not assumed to have the capacity to take care of themselves." *Schall*, 467 U.S. at 265. And the State has an independent interest in protecting the welfare of children and safeguarding them from abuses. *Ginsberg* v. *New York*, 390 U.S. 629, 640-641 (1968); see also *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring) (teachers have general duty to protect pupils from mistreatment).[15] There is "obvious concern on the part of

[14] For purposes of this brief, our discussion focuses on elementary and secondary school students. Title IX applies with equal force to fund recipients that operate post-secondary educational institutions, but the liability calculus in those cases may be significantly different because they involve young adults and different types of school settings.

[15] Also, unlike employees' attendance at work, nearly all elementary and many secondary students are compelled by the government to attend school. Mahoney, *School Personnel & Mandated Reporting of Child Maltreatment*, 24 J. Law & Educ. 227, 228 & n.3 (1995) (compulsory school attendance statutes in all 50 states, usually applying to children aged 5 to 16); *Ingraham*, 430 U.S. at 660 n.14. The State "has a

parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986). All fifty States mandate that school teachers and administrators report suspected abuse of students. Mahoney, *School Personnel & Mandated Reporting of Child Maltreatment*, 24 J. Law & Educ. 227, 230 & n.13 (1995).

The common law has long recognized that heightened duties of care can render a party vicariously liable for its agent's intentional harm of those it has a duty to protect. See *Prosser and Keeton on the Law of Torts* 506-507 (W. Page Keeton ed., 5th ed. 1984) ("even where the servant's ends are entirely personal, the master may be under such a duty to the plaintiff that responsibility for the servant's acts may not be delegated to him. This is true in particular in those cases where the master, by contract or otherwise, has entered into some relation requiring him to be responsible for the protection of the plaintiff."). Accordingly, a school's extraordinary control of, and responsibility for, its students may create cir-cumstances in which school district liability may be appropriate even where employer liability might not be.

B. The Court Of Appeals Applied The Wrong Legal Standard In Limiting Title IX Recipient Liability to Actual Knowledge

1. By limiting school district liability under Title IX for teacher-student harassment to cases in which a district employee with supervisory authority over the harasser actually knew of the abuse (or substantial risk thereof), had the power to end it, and failed to do so, the

heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring).

court of appeals (Pet. App. 15a) disregarded the traditional agency principles that both *Franklin* and *Vinson* indicate should be applied. In particular, the legal standard applied by the court of appeals cannot be reconciled with the ruling in *Vinson* that "absence of notice to an employer does not necessarily insulate that employer from liability" to an employee who was sexually harassed by her supervisor. 477 U.S. at 72 (citing Restatement §§ 219-237). Certainly the potential for school district liability should be at least as great where a child is sexually harassed by her teacher as it would be in the employment context.

The court of appeals also ignored the realities of children's vulnerability in elementary and secondary school settings. The court of appeals' interpretation would deny Title IX's protection to children who cannot understand which teacher or other authority figure at school has supervisory authority over the harasser. The consequences of the court of appeals' rule are illustrated by *Canutillo Independent School District* v. *Leija*, 101 F.3d 393 (5th Cir. 1996), cert. denied, 117 S. Ct. 2434 (1997), in which the same court held that a school district was not liable for a teacher's sexual molestation of a second grader during weekly movies in health class—despite the fact that (a) the student and her mother, as well as another girl in the class, had all complained to the girls' homeroom teacher about the other teacher's conduct, (b) complaining to the homeroom teacher complied with the procedures in the school's handbook, *id.* at 398-402, and (c) the same teacher continued to sexually molest little girls in his class for another year until "four more girls complained of sexual abuse, this time to the principal," who reported the matter to the superintendent. *Id.* at 402.

2. The court of appeals based its erroneous legal standard in part on its reasoning in *Rosa H.* v. *San Elizario Independent School Dist.*, 106 F.3d 648 (5th Cir. 1997), that money damages were not available because

Title IX was enacted under the Spending Clause and Title IX recipients are not on sufficient notice, as required by *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 28-29 (1981), of their liability for intentional acts of their agents.[16] This Court rejected that view in *Franklin*:

> The point of not permitting monetary damages for an unintentional violation [as in *Pennhurst*] is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. * * * This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.

Franklin, 503 U.S. at 74-75. The *Franklin* Court held that, "[u]nquestionably," the district had notice under Title IX that it had a duty not to discriminate on the basis of sex and that, "when a teacher sexually harasses and abuses a student," that is intentional discrimination based

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[16] Although *Franklin* left open the question whether Title IX was enacted exclusively pursuant to the Spending Clause, 503 U.S. at 75 n.8, other decisions of this Court reflect the view that Title IX (and Title VI and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which are similar federal funding statutes with nondiscrimination conditions) were enacted pursuant to Section 5 of the Fourteenth Amendment. See *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982) (assum-ing that Title IX is Section 5 legislation); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 n.7 (1979) (noting Congress's reference to its enforcement responsibilities under the Fourteenth Amendment as justification for including Titles VI and IX in the amendment to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988); cf. *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 n.2 (1987) (Section 504); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 244 n.4 (1985) (Section 504); *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 206 n.6 (1979)(contrasting Title VI to Title VII, which was "not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments"); *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992) (in context of dismantling former dual system of higher education, protections of Title VI extend no further than the Fourteenth Amendment).

on sex, which Congress clearly did not intend to support with federal funds. *Id.* at 75. Thus, in such cases "the normal presumption in favor of all appropriate remedies," including damages, applies. *Id.* at 74. Although the Court's description of the facts in *Franklin* indicated that the complaint alleged that "teachers and administrators" had become aware of the harassment but had failed to take action to halt it (*id.* at 64), the Court did not advert to that fact in its legal analysis or suggest that it was a necessary condition for liability. As a condition of receiving federal funds, respondent agreed to abide by Title IX's requirement that no person be subjected to sex discrimination under any of its programs or activities. There is nothing ambiguous about that agreement and no justification for deviating from normal legal rules that would hold an entity bound by such a condition liable when its agent, to whom it delegated authority under the education program, fails to satisfy the condition. "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of public policy than that of liability of the principal without fault of his own." *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 568 (1982) (quoting *Gleason* v. *Seaboard Air Line Ry.*, 278 U.S. 349 (1929)).[17]

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[17] In *Hydrolevel*, this Court upheld the liability of a nonprofit organization for punitive, treble damages, based on its agent's violation of antitrust law even though the agent acted only with apparent authority, because only a principal "can take systematic steps to make improper conduct on the part of all agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [the principal] to take those steps." 456 U.S. at 572. The Court further noted that to require the principal to ratify an agent's action before liability attaches would discourage oversight of agents, because principals would have reason to remain ignorant of agents' conduct. *Id.* at 573. Cf. *Bonner* v. *Lewis*, 857 F.2d 559 (9th Cir. 1988) (applying respondeat superior liability under Section 504, noting, *inter alia*, that

The antidiscrimination mandate of Title IX is clear, and the contrast between it and the ambiguous congressional preference at issue in *Pennhurst* "could not be more stark." Cf. *School Bd. of Nassau Co.* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (distinguishing analogous antidiscrimination mandate in Section 504 of the Rehabilitation Act from statutory provision at issue in *Pennhurst*); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891 n.8 (1984) (distinguishing express statutory obligation to provide special education and related services as condition of receipt of funds, from "precatory terms" at issue in *Pennhurst*). Title IX fairly put respondent on notice that, as a condition of federal funding, it must abide by the nondiscrimination provision. Because a school district can act only through individuals, application of traditional, imputed employer liability for intentional wrongs of employees would be a reasonable expectation, particularly in the absence of any other liability standard articulated by Congress. Cf. *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665 (1985) (absence of bad faith does not absolve State from liability for funds spent contrary to terms of grant agreement under Title I of the Elementary and Secondary Act of 1965).

3. The court of appeals also declined to apply agency principles in Title IX cases because Title IX does not explicitly refer to an "agent" as Title VII does. But in *Vinson* the Court viewed the inclusion of the term "agent" in the Title VII definition of "employer" as a *limitation* on employer liability. For that reason, the Court held that

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a well-known justification is to induce employers to exercise special care in selection, instruction and supervision of employees, and that sanctions under Section 504 are aimed at fund recipients, not employees); *Sharrow* v. *Bailey*, 910 F. Supp. 187 (M.D. Penn. 1995) (Section 504 respondeat superior liability); *Glanz* v. *Vernick*, 756 F. Supp. 632, 636 (D. Mass. 1991) (same); *Patton* v. *Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980) (same).

employers are not "always automatically liable for sexual harassment by their supervisors" under Title VII. 477 U.S. at 72. The absence of such a limiting provision in Title IX's broad prohibition of discrimination cannot therefore be interpreted to immunize Title IX recipients from liability for the acts of their employees. To the contrary, as we have explained, the text of Title IX supports liability under agency principles, consistent with the special considerations pertinent to the school setting and the teacher-student relationship.[18]

C. The Record Evidence Raises Issues Of Material Fact That Preclude Summary Judgment for Respondent

1. The record contains sufficient evidence (see pp. 1-5, *supra*) from which a factfinder could conclude that Waldrop was aided by his agency relationship with the school district in creating the hostile educational environment to which Gebser was subjected. The incidents of harassment occurred during a period in which Gebser was under Waldrop's direct supervision and control and he had authority to direct her studies and grade her work. A factfinder could conclude that Waldrop used his authority to inject sexually suggestive comments and innuendo during class, when students were essentially a captive audience. There is evidence that Waldrop used his professional authority over Gebser to obtain entry to her home, under the guise of providing her with materials for a

[18] In *Rosa H.*, 106 F.3d at 658, the Fifth Circuit declined to defer to the Department's policy guidance on sexual harassment in cases where the sexual harassment had occurred before issuance of the guidance. The court thereby mistakenly treated the guidance as legislative in nature—i.e., as prescribing new norms of conduct, rather than as an interpretation of an unchanged statutory provision. Moreover, the Department of Education had long interpreted Title IX to impose liability on recipients for sexual harassment by teachers in a case such as this (see pp. 13-14, *supra*); and this Court had decided *Vinson* and *Franklin* before the sexually assaultive incidents in this case occurred.

school assignment, so that he could sexually assault her. There is also record evidence that throughout the summer Waldrop (a) used his authority as a teacher in the district to enable him to supervise Gebser on a weekly basis during which time he continued to sexually harass her; (b) was able to gain custody over her during those periods by picking her up from her parents' house, under the guise of his authority as her school teacher; (c) used his authority to direct her to a place other than his classroom where she was in a more vulnerable position; and (d) exploited his professional author-ity by using the purported study times to engage in sexual intercourse with Gebser. Waldrop continued to use his professional authority over Gebser the next fall to call her aside at the end of class to arrange to have sexual intercourse with her.

In sum, there is sufficient evidence from which to find that Waldrop was aided by his agency relationship with the school district and used his supervisory authority over Gebser to accomplish his sexual harassment of her. Furthermore, a factfinder could conclude that it was reasonable for Gebser to fear that adverse educational consequences would result if she resisted or complained. Gebser testified at her deposition that her primary reason for acquiescing in the sexual relationship was her fear that if she reported it, she would lose Waldrop as a teacher and mentor and thus forfeit the recognition and development of her academic abilities that he provided in his agency role. J.A. 62a-63a.

2. The record evidence (see pp. 4-7, *supra*) also raises an issue of material fact regarding whether respondent knew or should have known about the harassment of Gebser. There is evidence that respondent was on actual notice that other girls complained about inappropriate sexual comments by Waldrop. Complaints about his sexually suggestive comments were made to a high-level agent of respondent, the school principal. Evidence showed that

one girl was so leery of Waldrop that she refused to be alone in a classroom with him after school, and another girl complained about his sexually inappropriate remarks in a class in which Gebser was also a student. Yet respondent did not take steps to determine the truth of the allegations,[19] did not inform Waldrop that his comments were improper, and did not check whether any previous complaints had been made against Waldrop. Respondent did not interview other students or teachers who were present when the alleged conduct took place. Respondent's superintendent acknowledged that, in such circumstances where the alleged conduct occurred in front of other people, it would be inadequate simply to interview the teacher. Collier Dep. 45. Here, Gebser was identified as one of the other students in the class in front of whom Waldrop had made inappropriately sexual comments; thus, she was one of the witnesses who could have been questioned about the allegations. Furthermore, in light of one girl's reported fear of being alone in a classroom with Waldrop, a reasonable investigation would have included an interview with any students who had spent substantial time alone with him in a classroom, which would have led directly to Gebser.

There is also evidence that a school board member knew of previous complaints about Waldrop, although the present record does not manifest whether those complaints involved sexual conduct or comments. There is evidence that another teacher had actual notice of complaints about Waldrop's sexually inappropriate classroom behavior, but apparently did not report them further and did nothing to investigate. See note 3, *supra*. In addition,

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[19] See 62 Fed. Reg. at 12,050 n.69 ("Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.").

the evidence indicates that respondent took no action to prevent or deter future harassment. At a minimum, an appropriate response would have involved "inform[ing] the school community that harassment will not be tolerated," and "making sure that the harassed students and their parents know how to report any subsequent problems and making follow-up inquiries to see if there have been any new incidents or any retaliation." 62 Fed. Reg. at 12,043, 12,050 n.77.

A factfinder could also conclude that respondent did not have an effective sexual harassment policy or grievance procedure. According to the deposition of respondent's Title IX coordinator, the district had no formal policy or procedure with respect to complaints of sex discrimination or sexual harassment. It is undisputed that no such information was ever communicated to respondent's students. And Gebser testified that she did not know what she was supposed to do when she became the victim of Waldrop's harassment as a fourteen-year-old high school freshman and that, had she been made aware that the school had effective procedures for dealing with such incidents, she would have reported the harassment. A factfinder could conclude that, in light of all these circumstances, respondent knew or should have known about the harassment of Gebser and failed to respond effectively.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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JANUARY 1998

No. 96-1866

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ALIDA STAR GEBSTER & ALIDA JEAN MCCULLOUGH,
Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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24 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief *amicus curiae* is filed by the National Education Association ("NEA") with the written consent of the parties as provided for in the Rules of the Court.[1]

INTEREST OF *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide employee organization with approximately 2.3 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

is strongly committed to ending gender discrimination by educational institutions, including sexual harassment, and, to this end, firmly supports the vigorous enforcement of Title IX.

SUMMARY OF ARGUMENT

1. It is settled by *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) that "Title IX placed on [school districts] the duty not to discriminate on the basis of sex," that "teacher sexual harassment" of a student breaches that duty and that school districts can be held liable in Title IX "teacher sexual harassment" damage suits. But the lower courts are deeply divided as to the governing school district legal liability standard.

2. It is our submission—subject to one caveat—that the soundest approach for determining school district liability in Title IX teacher sexual harassment cases is the approach based on the clear and indisputable principles of the developed doctrine governing the liability of employing entities of various kinds to third parties for torts of the entity's employees applied so as to take account of the underlying anti-discrimination law substantive principles. The agency law "scope of employment" concept is a general one that applies in the same way to each of the various kinds of authority that an employing entity can grant to its employees whose role is to supervise or to exercise authority and control over, others. And, on this concept the law holds the employing entity liable for actions taken by the employee within the area that is delegated, whatever that area may be.

These agency principles have proved sound in their field of direct application and serve to effectuate the anti-discrimination purposes of Title IX.

3. While we advocate the general agency principles approach to school district Title IX liability in this kind of case, we add one caveat.

Title IX's goal is to foster non-discriminatory "education programs and activities," and Title IX damage suits are a means toward realizing that end and not an end in themselves. Indeed, when all is said and done, the most effective means for reaching Title IX's goal are pro-active school district efforts to promote equal treatment of all students and to prevent discrimination. And, there is a legitimate basis for concern that the general agency principles school district liability approach will cut against school district adoption and effectuation of such pro-active sexual harassment programs.

All that being so, recognizing an effective pro-active school district sexual harassment policy grievance procedure and prevention program as an affirmative defense to a Title IX damages claim—with the burden of proof on the school board to make the requisite showing regarding the adoption, implementation and effectiveness of such a program—would have the salutary effect of stimulating districts to adopt and implement such program and, in that way, to take vigorous and effective steps toward bringing about Title IX's goal of non-discriminatory education programs and activities.

ARGUMENT

The legal fault line along which the question presented here arises is this: The complaint in this case alleges sexual harassment by a Lago Vista Independent School District teacher of a School District student "under [a School District] education program or activity receiving Federal financial assistance" in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits such sex discrimination in such programs. And, the complaint names the School District—a "legal person" which is incapable of committing such discriminatory acts, or, indeed, any act, on its own, and which can only act through natural persons—as the defendant liable for this alleged discriminatory wrong and seeks damages from the School District for the wrong.

It is settled by *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) that school districts can be held liable in Title IX "teacher sexual harassment" damage suits. But the lower courts are deeply divided as to the governing school-district-legal-liability standard. That being so we begin by briefly outlining what is settled before turning to the point in controversy.

1. *The Lessons of Franklin.* In *Franklin* the plaintiff student brought suit against a county public school district alleging "continued sexual harassment . . . from . . . a sports coach and teacher employed by the district" and further alleging that "though they became aware of and investigated [this] sexual harassment . . . teachers and administrators took no action to halt it[,] discouraged the plaintiff from pressing charges . . . [and on the teacher's eventual resignation. the] school . . . closed its investigation." 503 U S. at 63-64.

In reversing a lower court decision holding that Title IX does not "authorize an award of damages," the Court addressed the substance of the student's Title IX claim in the following terms:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional action it sought by statute to proscribe. [503 U.S. at 75.]

And, as to the school district's defense that Title IX, as a Spending Clause statute, will not support a teacher sexual harassment damages claim, the Court added:

> Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by our unanimous holding in [*Consolidated Rail Corporation* v.] *Darrone*, [465 U.S. 624 (1984).] See 465 U.S. at 628. Respondents and the United States characterize the backpay remedy in *Darrone* as equitable relief, but this description is irrelevant to their underlying objection: that application of the traditional [remedy] rule in this case will require state entities to pay monetary awards out of their treasuries for intentional violations of federal statutes.

Since the Title IX rule that when a school district teacher sexually harasses a student because of the student's sex in the course of a school district "education program or activity receiving federal financial assistance," that teacher "discriminate[s] on the basis of sex," is derived from the Title VII of the Civil Rights Act of 1964 "supervisor" sexual harassment rule, the rationale of the latter serves to illuminate *Franklin's* meaning.

As the *Meritor* Court stated, since "a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a

living can be as demeaning and disconcerting as the harshest of racial epithets," sexually abusive behavior directed at one sex can so "alter the conditions of employment" as to create a "discriminatorily abusive work environment," violative of Title VII. 477 U.S. at 66, *quoting Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). In other words,

> the very fact that discriminatory conduct [is] so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality. [*Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993).]

Conversely, because Title VII does not outlaw harassing conduct as such, but only "discriminat[ion] against any individual with respect to his . . . conditions of employment, because of such individual's race, color, religion, sex, or national origin," discriminatorily abusive "[c]onduct that is not severe or pervasive enought to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris*, 510 U.S. at 21.

Sexual harassment of the kind covered by the *Meritor/Harris* standard, then, is unlawful discrimination because it subjects members of the disfavored group to disadvantages and distractions that the favored group is not subjected to and because the discrimination demeans the discriminatees as employees and as human beings, with the foreseeable result of "detract[ing] from employees' job performance, discourag[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers." *Harris*, 510 U.S. at 22.

The same considerations obtain in the school setting in heightened terms. "A requirement that a [child] run a gauntlet of sexual abuse in return for the privilege of being allowed to" study and obtain an education is as

improperly "demeaning and disconcerting" as such a workplace requirement. And, it is equally certain that such a requirement "alter[s]" the child's "educational program or activity" so as to create a discriminatorily abusive educational environment.

Indeed, parents who relinquish temporary custody of their children to a school expect that the children will learn in an environment free of sexual harassment or abuse. And, students in grades kindergarten through high school do not have the option of simply absenting themselves from an abusive environment.[2]

The damage caused to students by sexual harassment, moreover, "is arguably greater in the classroom than in the workplace" because of its "longer lasting impact on its younger victims." *Mary M. v. North Lawrence Community School Corporation*, 7th Cir. No. 97-1285, 1997 WL 763470, at *7 (7th Cir. Dec. 12, 1997). What is more, "a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives." *Id.*

And, of at least equal importance, teachers serve as mentors and role models and exert a concomitant influence over their students.[3] Students "look to their teachers for guidance as well as for protection." *Mary M.* 1997 WL 763470, at *7. The student-teacher relationship is thus a relationship of "trust and dependency." *Patricia H. v. Berkeley Unified School Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993).

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[2] As one court explained, "[T]he fact that students are required to attend certain levels of school places a high duty on public school districts to protect the interests of the children." *Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Mo. 1996).

[3] *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979) ("a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.")

For all of these reasons, *Franklin's* recognition that Title IX, like Title VII, makes "discriminatorily abusive environment sexual harassment" unlawful is unassailable.

2. *The Disputed School District Liability Standard.* *Franklin*, as we have seen, states that "Title IX placed on the [defendant school district] the duty not to discriminate on the basis of sex," 503 U.S. at 75. And, under the most basic legal principles, a plaintiff in a Title IX sex discrimination case against a school district must therefore show that it is the district—and not a third person—that breached that duty.

(a) We begin with a commonplace that can not be lost sight of: where a complaint alleges that a natural person acted so as to commit a wrong that injured the plaintiff the determination that the defendant is legally liable is unproblematic. But a "government entity cannot act by itself . . . [its] personification is a legal fiction, and [it] can effect its goals only through [its natural person] agents." *Davis v. City of Sioux City*, 115 F.3d 1365, 1371 (8th Cir. 1997).

Thus, the determination that a school district has breached a legal duty, whether that duty arises under Title IX or from another source, of necessity, requires a determination that a school district official or employee or a group of such individuals committed such a breach coupled with a determination that the breach should be denominated as the school district's breach.

To put this another way, aside from the hypothetical case in which a sole educational-entity-proprietor/teacher, whose school receives federal financial assistance, sexually harasses the school's students, there is no case in which there is such an identity between the individual committing the discriminatory acts alleged in a Title IX complaint and the defendant educational entity/recipient of federal assistance as to make the imputation of the discrimination (and the liability) to the defendant self-evident.

The question, then, cannot be whether a school district/federal financial assistance recipient can ever be held legally responsible in damages for discriminatory actions in violation of Title IX taken by a school district teacher in carrying out his role of educating, supervising and directing students. Given the realities just noted, if there were no such school district legal responsibility the *Franklin* decision would be a dead letter.

(b) As we noted at the outset, and as the Court recognized by granting *certiorari* here, the lower courts are divided on the governing legal standard for determing school district legal liability for teacher sexual harassment violative of Title IX under *Franklin*. It is our submission that the soundest approach is the one based on the clear and indisputable principles of the developed doctrine governing the liability of employing entities of various kinds to third parties for torts of the entity's employees applied so as to take account of the underlying anti-discrimination law substantive principles. And, we develop one caveat to that submission in point 3 of our argument, *infra* pp. 13-20.

Since the nineteenth century the common law doctrine has based entity liability on the concept of delegated authority and recognized that delegated authority cannot be defined so narrowly that the employing entity is insulated from responsibility whenever its employees fail to live up to the entity's official rules of conduct. For that kind of narrow delegated authority concept would absolve entities of responsibility for the costs of injuries that are fully foreseeable risks of running an enterprise, and that should be borne by the entity rather than by the injured person:

> It is probably true that before the nineteenth century the master was not normally responsible for the uncommanded acts of the servant . . . However, with the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those work-

ing . . . for [its] benefit. [Restatement of the Law of Agency 2d (1958) ("Restatement"), § 219, Comment (a)].

Consequently, the clear understanding of modern agency law is that "An action, although forbidden, or done in a forbidden manner, may be within the scope of employment," and that "An act may be within the scope of employment although consciously criminal or tortious." Restatement §§ 230, 231. Indeed, the very concept of "scope of employment" has little content *other* than as a "bare formula to cover the unordered and unauthorized acts for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not." Prosser & Keeton, *The Law of Torts*, Fifth Edition, 1984, at 502. The "scope of employment" concept is, moreover, a general one that applies in the same way to each of the various kinds of authority that an employing entity can grant to its employees whose role is to supervise or to exercise authority and control over, others. Thus, traditional agency law holds the employing entity liable for actions taken by the employee within the area that is delegated, whatever that area may be.

These agency principles have proved sound in their field of direct application and serve to effectuate the anti-discrimination purposes of Title IX. And their point and proper application to teacher sexual harassment was succinctly stated in *Kracunas v. Iona College*, 119 F.3d 80, 87-88 (2nd Cir. 1997):

> Pursuant to [agency] principles, an employer will be liable for the torts of its employees if the employee " 'purported to act on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.' " *Karibian* [*v. Columbia University*,] 74 F.3d [773,] 780 [(2nd Cir. 1994)] (quoting Restatement (Second) of Agency §§ 219(1) & 2(d) (1958)) . . . . Here, Palma was most certainly acting as Iona's agent in his role of college professor. That very role furthered Iona's goal of attracting students to the college and placed Palma in a position of authority vis a vis his students. His blatant abuse of that authority, if proven, is sufficient under agency principles to impute liability to Iona. In the employment context, similar conduct by a supervisor undoubtedly would visit liability on the employer. College students should not receive less protection from conduct that is shown to be harassment (as opposed to teaching) than do employees in the workplace.[4]

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[4] In a variant on this approach the Eighth Circuit in *Kinman v. Omaha Public School District*, 94 F.3d 463, 469 (8th Cir. 1996) stated:

> We . . . apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student.
>
> The Supreme Court in *Meritor Savings* declined to set out a generally applicable standard of liability for employers under Title VII. 477 U.S. at 72. Instead, the Court suggested that common law agency principles should guide courts in determining employer liability on a case-by-case basis. *Id.* For example, . . . in a hostile environment sexual harassment case, "the usual basis for a finding of agency will often disappear." *Id.* at 71. In such cases, the employer should not be held liable unless the employer itself has engaged in some degree of culpable behavior. . . .
>
> We [therefore] hold that the "knew or should have known" standard is the appropriate standard to apply in a case such as this one involving a teacher's hostile environment harassment of a student.

Kinman, we submit, rests on a misreading of the quoted portion of this Court's *Meritor* opinion. What the relevant portion of the opinion says is:

> The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. . . . As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). [477 U.S. at 71.]

This Court did *not* approve—much less adopt—the EEOC suggestion. And, the better view is that Title VII supervisor discrimina-

(c) The court below, to be sure, has rejected the "agency principles" approach in favor of an approach pursuant to which "a school district is not liable for a teacher's sexual harassment unless it has actual notice of the harassment," with actual school district notice meaning that "a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so." *Rosa H. v. San Elizario Independent School Dist.*, 106 F.3d 648 (5th Cir. 1997). This "actual notice" approach has nothing to commend it.

Most particularly it waters down the Title IX duty stated in *Franklin*—not to discriminate on the basis of sex in the form of teacher sexual harassment of students—into a duty of teacher supervisors not to knowingly and passively suffer teacher sexual harassment of students. Doing so runs contrary to this Court's instruction that to give Title IX " 'the scope that its origins dictate, we must accord it a sweep as broad as its language.' " *North Haven Bd of Ed. v. Bell*, 456 U.S. 512, 521 (1982) quoting *United States v. Price*, 383 U.S. 787, 801 (1966).

And, while the court of appeals proceeded on the premise that an intentional wrong by a school district teacher in carrying out his assigned role of supervising and directing students cannot properly be imputed to the district as its intentional wrong but that a district supervisor's knowing inaction in the face of teacher harassment can properly be imputed to the district as an intentional wrong, neither logic nor the long lines of the law support this fine-spun, counter-intuitive distinction.

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torily abusive environment sexual harassment cases are governed by the genera! agency principles approach set out in the text above and not by a "knew or should have known" standard. That Title VII question, of course, is before the Court in *Faragher v. The City of Boca Raton*, No. 97-282.

Finally, the court of appeal's effort to tease its "actual knowledge" standard out of the linguistic differences between Title VII and Title IX does not bear analysis as Judge Rovner has recently demonstrated:

> Unlike Title VII . . ., which focuses on the discriminator, making it unlawful for an employer to engage in certain prohibited practices (*see* 42 U.S.C. § 2000e-2(a)), Title IX is drafted from the perspective of the person discriminated against. That statute names no actor, but using passive verbs, focuses on the setting in which the discrimination occurred. In effect, the statute asks but a single question—whether an individual was subjected to discrimination *under* a covered program or activity. And Title IX then broadly defines a "program or activity" to include *"all of the operations of* . . . a local education agency . . ., system of vocational education, or other school system." 30 U.S.C. § 1687 (emphasis added). . . . And because Title IX as drafted includes no actor at all, it necessarily follows that the statute also would not reference "agents" of that non-existent actor. [*Smith v. Metropolitan School Dist. Perry T.P.*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting.]

3. *The Matter of Prevention and Deterrence.* Having said this much in favor of the general agency principles approach to school district Title IX liability in this kind of case, we would be derelict if we did not add one caveat.

Title IX's goal is to foster non-discriminatory "education programs and activities," and Title IX damage suits are a means toward realizing that end and not an end in themselves. Indeed, when all is said and done, the most effective means for reaching Title IX's goal are pro-active school district efforts to promote equal treatment of all students and to prevent discrimination. Such efforts require a district to set norms, to monitor teacher implementation of those norms and to correct deviations. And, all that requires school district time and money.

It is in the nature of things, as well, that no such effort will bring absolute and unvarying perfection. Given human imperfection, the numbers of teachers in a school district and the number of discrete settings in which those teachers exercise their authority to supervise and direct students, that is particularly true where the discrimination in question takes the form of teacher sexual harassment.

Thus, there is a legitimate basis for concern that the general agency principles school district liability approach will cut against school district adoption and effectuation of pro-active sexual harassment programs. The logic of that concern is developed in Judge Posner's opinion in *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 511 (7th Cir. 1997), which considered the cognate employer Title VII liability for supervisor sexual harassment issue:

> A law that requires the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits. . . .
>
> In these circumstances, strict liability would not only be expensive and unnecessary, and possibly regressive as well; it would be futile. If the law imposes liability in harassment cases in which there is no reasonable measure that the employer could have taken to prevent the harassment, the *only* effect of the law will be to impose extra costs on employers and those with whom they are linked contractually. Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability . . .
>
> Sometimes the incremental contribution of strict liability to deterrence is nil or slight, and easily outweighed by the additional costs of a more expansive liability.

Moreover, we recognize that the court of appeal's "actual knowledge" approach to school district Title IX liability can be said to speak to this concern by insulating

a district from liability for teacher sexual harassment that is infeasible to control. But what that leaves unsaid is that the actual knowledge approach does so in passing and at too high a price. For that approach simply insulates school districts from such liability in a large number of instances without regard to whether the district has taken any pro-active steps for prevention and control, much less all feasible steps. And, that is the fatal weakness of the "knew or should have known" school district liability approach as well. Thus, so far as we can see, or has been suggested, there is no "deterrence" argument for adopting either of those approaches in preference to the agency law principles approach outlined above.

But, of course, the standard for imputing legal responsibility for entity employee actions and decision to the entity is not the only means by which the law adjusts the fixing of damages liabilities in the interest of promoting entity action that forwards the purposes of the underlying legal command by maximizing compliance. Another more direct, and more carefully calibrated option is to recognize, as an affirmative defense to a damages claim against the entity, a sufficient showing that the entity had adopted and has implemented an effective prevention and compliance program.

There is, we believe, much to be said for following just that course in the Title IX context. As we have noted, there is the broadest agreement that such programs are the key to the fullest possible realization of Title IX's goal of education programs and activities free of teacher sexual harassment. Similarly, given the nature of this wrong and the nature of the school context there is every reason to believe that after-the-fact Title IX damages suits against school districts are not sufficient on their own to effectuate Title IX's anti-discrimination purposes. And, as Judge Posner points out, there is a rational basis for concern that such damage suits standing alone may cut against the law's deterrent purposes.

All that being so, recognizing an effective pro-active school district sexual harassment policy, grievance procedure and prevention program as an affirmative defense to a Title IX damages claim—with the burden of proof on the school board to make the requisite showing regarding the adoption and implementation of such a program and regarding the program's effectiveness—would have the salutary effect of stimulating districts to adopt and implement such programs and, in that way, to take vigorous and effective steps toward bringing about Title IX's goal of non-discriminatory education programs and activities. And, on that basis, we conclude by outlining what we see as the basic requisites for such a program.

a. *The Sexual Harassment Policy.* The necessary first element is the adoption by the school district and the wide dissemination to all staff, students, and parents, of a policy that "clearly states sexual harassment will not be tolerated and that explains what types of conduct will be considered sexual harassment." U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* 8 (1997); *see also* 34 C.F.R. § 106.8(b) (Title IX requires schools to adopt and publish a policy against sex discrimination). The policy must be written in language that can be easily understood by students and should include examples of behavior that constitute sexual harassment. *See* U.S. Department of Education, Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,045 (1997) ("*OCR Guidance*").

b. *The "Prompt and Equitable" Grievance Procedure.* The equally necessary second step is the adoption and wide dissemination to all staff, students, and parents, of a Title IX grievance procedure that provides for the "prompt and equitable" resolution of any allegation of sexual harassment. *OCR Guidance*, 62 Fed. Reg. at 12,044-45; 34 C.F.R. § 106.8(b). It is particularly important that the procedure *encourage* students to report

instances of sexual harassment. *See Meritor*, 477 U.S. at 73 (noting that grievance procedures should be "calculated to encourage victims of harassment to come forward"); *see also Gary v. Long*, 59 F.3d 1391, 1398-99 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995) (noting that, to dispel a supervisor's apparent authority to harass, the employer must establish that "grievance procedures were clearly 'calculated to encourage victims of harassment to come forward' ") (citation omitted). Moreover, while Title IX requires schools to designate at least one employee to receive complaints (34 C.F.R. § 106.8(a)), a school also must designate alternative persons for receiving complaints to insure that students have "effective" means for reporting harassment. *OCR Guidance*, 62 Fed. Reg. at 12,045. *Cf. Meritor*, 477 U.S. at 73 (faulting failure of employer's grievance procedure to provide employee with alternative route for complaining about sexual harassment).

In its Policy Guidance, OCR has advised schools that, in order to meet the "prompt and equitable" requirement of Title IX, the grievance procedure should include the following elements:

> (1) Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
>
> (2) Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
>
> (3) Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
>
> (4) Designated and reasonably prompt timeframes for the major stages of the complaint process;
>
> (5) Notice to the parties of the outcome of the complaint; and
>
> (6) An assurance that the school will take steps to prevent recurrence of any harassment and to correct

others, if appropriate. [*OCR Guidance*, 62 Fed. Reg. at 12,044.]

Title IX also prohibits retaliation for filing a grievance or participating in an investigation, and protection from such retaliation should therefore be guaranteed in the school district policy and grievance procedure. *Id.* An effective Title IX grievance procedure must also include "an opportunity to appeal the findings or remedy or both" and a voluntary and informal means for complaint resolution. *Id.* at 12,044145.

c. *The Prevention Program.* The adoption of sexual harassment policy and grievance procedure, standing alone, is not sufficient, however. What is required is such a policy, such a procedure, *and* a prevention program. "Adoption of strong preventive measures is often the best way to confront the serious problem of sexual harassment." U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* 9 (1997); *see also* EEOC Policy Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(f) ("Prevention is the best tool for the elimination of sexual harassment."); Judith B. Brandenburg, *Sexual Harassment: A Challenge to Schools of Education* 19 (1995) ("Sexual harassment policies and procedures will continue to be necessary but not sufficient unless the problem of sexual harassment is addressed proactively through education."); Sharon Howard, *Organizational Resources for Addressing Sexual Harassment*, 69 J. of Counseling & Development 507, 509-10 (1991) (same); Irwin A. Hyman, *et al.*, Policy and Practice in School Discipline: Past, Present and Future 12-13 (Oct. 1994) (paper presented at the "Safe Schools, Safe Students" Conference, on file with NEA) (same).

The essential point, as a recent study at the University of Massachusetts, Amherst revealed, is that:

> [E]ducational efforts effectively increased female undergraduate awareness of the university's sexual harassment policy and grievance procedure and also raised their awareness of the illegality of sexual harassment. More importantly, the evidence suggests that the observed decline in reports of sexual harassment of women students by university faculty and staff represents a real change in the behavior of university employees, and that this change most likely occurred in response to the university's sexual harassment policy and grievance procedure.

Elizabeth A. Williams, *The Impact of a University Policy on the Sexual Harassment of Female Students*, 63 J. of Higher Educ. 50, 60-61 (1992). *See also* Kathleen Beauvais, *Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes*, 12 Signs: J. of Women in Culture & Society 130, 139-43 (1986).

Thus, the necessary third element of a pro-active program is providing students with frequent, age-appropriate, and flexible training that instructs students both how to recognize sexual harassment and what to do if it occurs. *See OCR Guidance*, 62 Fed. Reg. at 12,044. To this end, sexual harassment awareness—or, more broadly, lessons regarding mutual respect—can and should be incorporated into the curriculum. *See, e.g.*, Nan Stein & Lisa Sjostrom, *Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools* (1994); Nan Stein & Lisa Sjostrom, *Bullyproof: A Teacher's Guide on Teasing and Bullying* (1996). Without such instruction, students, particularly younger students, may not understand what conduct is inappropriate or know how to make use of their school's Title IX grievance procedure. *See OCR Guidance*, 62 Fed. Reg. at 12,040.

By the same token, "the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates." *See OCR Guidance*, 62 Fed. Reg. at 12,045. All "administrators, teachers, and staff," moreover, should receive training "to ensure that they understand what types of conduct can

cause sexual harassment and that they know how to respond." *See OCR Guidance*, 62 Fed. Reg. at 12,044.

Of equal importance, the school district must institutionalize the sexual harassment policy and the lessons of its training and education instruction by monitoring teacher compliance with the district norms on sexual harassment, by following up on any information suggesting instances of teacher sexual harassment and by taking prompt and effective action to correct any deviation from those norms.

CONCLUSION

For the reasons stated, the decision of Court of Appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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No. 96-1866

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ALIDA STAR GEBSER and ALIDA JEAN McCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, CALIFORNIA WOMEN'S LAW CENTER, *et al.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

(Additional *Amici* Listed Inside Cover)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

MISCELLANEOUS

INTERESTS OF AMICI CURIAE

Amici curiae are organizations dedicated to the achievement of equality of opportunity for women and girls. Descriptions of the individual *amici* organizations and their interests in this case are set forth in the appendix[1]

SUMMARY OF ARGUMENT

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992), this Court recognized that a teacher's sexual harassment of a student constitutes a form of sex discrimination that is prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. This case requires the Court to determine what standard governs a school's responsibility for sexual harassment by its teachers. In *Franklin*, the Court looked to the law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for guidance in construing Title IX's application to sexual harassment. *Id.* It should do the same here.

Drawing on principles of institutional liability established in Title VII cases, and in recognition of the realities of sexual harassment in schools, this Court should hold schools liable for sexual harassment where: (1) the harasser acted as an agent of the school by relying on the apparent authority of the school or by using the authority delegated from the school to accomplish the harassment; or (2) the school knew or should have known of the

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

harassment, yet failed to take prompt and appropriate corrective action. In applying the second standard, a school's failure to adopt and disseminate effective policies and procedures for addressing sexual harassment should establish constructive notice of any harassment that does occur, because the school failed to take reasonable steps to find out about the harassment.

Principles of agency law, which courts have long applied to determine employer liability for sexual harassment under Title VII, are no less applicable to claims challenging sexual harassment under Title IX. The Court in *Franklin* implicitly recognized this: in construing Title IX to prohibit sexual harassment, the Court relied on *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), which directed courts to look to agency principles in determining employer liability for sexual harassment under Title VII. The application of agency principles under Title IX is particularly compelled by the extreme vulnerability of students to school authority and the special role that this authority plays in virtually all teacher-student relations.

Under established agency principles, a federally funded school is liable under Title IX for a teacher's sexual harassment of a student if the harassment was facilitated, either expressly or implicitly, by the teacher's actual or apparent authority as an employee of the school. This standard of liability, which is set forth in Section 219(2)(d) of the *Restatement (Second) of Agency*, properly recognizes the pervasive role of the school's delegated authority in teacher-student relationships. As much as sexual harassment by a supervisor in the workplace is facilitated by the supervisor's authority over employees, s*ee Meritor*, 477 U.S. at 76-77 (Marshall, J., concurring), the power exercised by teachers over students, accentuated by differences in age, is at least, if not more, compelling.

Relying in part on standards developed to govern sexual harassment in the workplace, and recognizing that students deserve at least as much protection from such discrimination as employees, the Department of Education's Office for Civil Rights ("OCR") has issued a policy guidance interpreting Title IX to hold schools responsible for sexual harassment aided by a teacher's actual or apparent authority. As the agency charged with enforcing Title IX, OCR is entitled to deference in its interpretation.

Holding schools liable for sexual harassment aided by a teacher's actual or apparent authority creates the incentives necessary to achieve Congress' intent that Title IX root out all forms of sex discrimination in federally funded educational programs and activities. Application of the Section 219(2)(d) standard will prompt schools to reach out to both students and teachers to ensure a clear understanding that any act of sexual harassment will not be tolerated. Indeed, held to the Section 219(2)(d) standard, schools will have strong incentive to prevent sexual harassment before it occurs.

In addition to being liable for the discriminatory acts of their agents, schools also must be deemed liable for their own conduct under Title IX. If a school fails to provide reasonable measures for reporting and adequately addressing incidents of sexual harassment, and such harassment occurs, the school should be liable under Title IX because it should have known about and responded to the harassment. Sexual harassment in schools is eminently foreseeable. Accordingly, any school that fails to provide meaningful channels for reporting and responding to sexual harassment must be deemed to have constructive notice of any harassment that occurs.

Holding schools liable for failing to establish antiharassment policies and meaningful reporting procedures serves, like the Section 219(2)(d) standard, to further Congress' goal that Title IX eliminate all forms of sex discrimination in federally funded educational programs and activities. Experience has shown that the adoption by schools of clear sexual harassment policies and adequate reporting procedures can reduce the incidence of sexual harassment. The Fifth Circuit, by rejecting a constructive notice standard of liability under Title IX, has undermined the statute's intended prompting of such measures and has created the perverse incentive for schools to ignore indicia of sexual harassment and discourage students from reporting them. Congress cannot possibly have intended this result.

Consistent with the language and legislative history of Title IX, this Court's own precedent, and the experienced judgment of the OCR, the Court should reverse the decision below and hold that the Lago Vista Independent School District may be liable under Title IX for the sexual harassment of Alida Star Gebser both because of its failure to establish meaningful policies and procedures for reporting and addressing sexual harassment, and because the harassment was aided by the actual or apparent authority of the school district's employee.

ARGUMENT

I. EDUCATIONAL INSTITUTIONS SHOULD BE LIABLE UNDER TITLE IX FOR SEXUAL HARASSMENT THAT IS FACILITATED BY ACTUAL OR APPARENT INSTITUTIONAL AUTHORITY

Title IX imposes liability on institutions for the purpose of eradicating sexual discrimination in education.

Like any statute, Title IX must be interpreted in light of the realities of the contexts to which it applies. With respect to sexual harassment of students by teachers, such as that suffered by Alida Star Gebser in this case, Title IX's efficacy depends on a liability standard that holds schools accountable for a teacher's discriminatory use of his or her actual or apparent authority. The application of such a standard is imperative to achieve the goals underlying Title IX.

A. This Court's Jurisprudence Supports The Application of Agency Principles To Hold Schools Liable for Teacher-Student Sexual Harassment

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court held that Title IX supports a damages remedy for teacher-student sexual harassment. The Court based this holding on a careful review of the legislative history of Title IX and on its earlier determination in *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), that sexual harassment is a form of intentional discrimination. *Franklin*, 503 U.S. at 75 (quoting *Meritor*, 477 U.S. at 64).

The *Franklin* Court's reliance on *Meritor* strongly suggests that agency principles properly apply to determine liability under Title IX. In *Meritor*, the Court stated that agency principles should guide the determination of liability for "hostile environment" sexual harassment under Title VII. *Meritor*, 477 U.S. at 65-66.[2] In *Franklin*, after

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[2] This Court is also currently reviewing *Faragher* v. *City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), which presents the issue of how agency principles apply to hold employers liable for sexual harassment by a supervisor under Title VII. For the reasons discussed below, students are entitled to at least as much

reiterating its finding in *Meritor* that "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex,'" the Court stated: "We believe the same rule should apply when a teacher sexually harasses and abuses a student." *Franklin*, 503 U.S. at 75 (quoting *Meritor*, 477 U.S. at 64).

Following *Franklin*, almost all of the federal circuit courts that have addressed Title IX claims have interpreted the statute to impose liability for sexual harassment based on principles of agency similar to those applicable under Title VII.[3] The lower courts' application of agency principles under Title IX reflects a proper understanding of this Court's jurisprudence as articulated not only in *Franklin* itself, but also in the *Meritor* opinion upon which *Franklin* relies.

The rationale behind the application of agency principles in *Meritor* – the pervasiveness of an employer's authority, both express and implicit, over a subordinate's actions, and the responsibility of the employer to exercise appropriate control over the work environment – is at least

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protection from sexual harassment in school as are employees in the workplace. Indeed, the particular vulnerabilities of students may warrant providing even greater protection under Title IX.

[3] *See, e.g., Lipsett* v. *University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Murray* v. *New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995); *Brzonkala* v. *Virginia Polytechnic Inst.*, 1997 WL 785529 (4th Cir. 1997); *Doe* v. *Claiborne County*, 103 F.3d 495 (6th Cir. 1996); *Kinman* v. *Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Oona, R.S.* v. *McCaffrey*, 122 F.3d 1207 (9th Cir. 1997); *cf. Seamons* v. *Snow*, 84 F.3d 1226 (10th Cir. 1996). *But see Rosa H.* v. *San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); *Smith* v. *Metropolitan Sch. Dist.*, 128 F.3d 1014 (7th Cir. 1997).

as, if not more, compelling in the educational context as in the context of the workplace. In *Meritor*, Justice Marshall explained why "hostile environment" harassment should be actionable under agency principles just as are other forms of sexual discrimination:

> A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied only in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Meritor, 477 U.S. at 76-77 (Marshall, J., concurring).

Justice Marshall's reasoning regarding the application of agency standards to hostile environment sexual harassment under Title VII is poignantly apt in the Title IX context. Unless agency principles apply to hold schools liable for sexual harassment of students, schools would owe

a greater duty to protect their employees from sexual harassment under Title VII than they owe their students under Title IX. None of the differences between the school and work context justify such a result. Schools are under a legal duty to supervise and care for minor students.[4] Even beyond those levels at which students are required to attend school, "a teacher occupies a position of power over students, and the power of that position is sanctioned and enforced by the school."[5] The institutional authority inherent in the school setting extends to virtually all interactions between teachers and students, and "is accentuated by the age difference between student and teacher and the roles the teacher must play – educator, guardian, role model, mentor, and even parental figure."[6]

In this case, Alida Star Gebser perceived her harasser, Frank Waldrop, as her mentor. She looked to him for guidance and advice. His institutional power to help her advance in school, and in particular to attend college, curtailed her ability to object to his advances. Unquestionably, the authority vested in Waldrop by the school district played a facilitating role in the harm Gebser suffered in this case. *See* Petitioner's Statement of Facts.

In the decision below, the Fifth Circuit ignored the wealth of authority justifying the application of agency principles under Title IX and reiterated its erroneous reasoning in *Rosa H.* v. *San Elizario Independent School*

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[4] Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 Emory L.J. 271, 291 (1994).

[5] Neera Rellan Stacey, *Seeking A Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. Rev. 1338, 1372 (1996).

[6] *Id.* at 1373.

District, 106 F.3d 648 (5th Cir. 1997), that the application of agency principles under Title IX would be inconsistent with this Court's decision in *Franklin*. The Fifth Circuit's reasoning reflects a fundamental misunderstanding of this Court's analysis in *Franklin*.

In *Rosa H.*, the Fifth Circuit misread *Franklin* to limit school liability for damages under Title IX to cases where the school itself intended to discriminate. But the Court's discussion of "intentional" discrimination in *Franklin* did not pertain to any standard of liability based on the subjective intent of a school district itself to discriminate. Rather, that discussion related to the question, previously analyzed in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), whether damages are available in cases involving disparate impact, as opposed to disparate treatment, claims. *See Guardians*, 463 U.S. at 602-03. *See also Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (rejecting the argument that a school board must itself have acted with discriminatory intent to be liable for damages because that argument "misconstrues the use of the term 'intent,'" and, "[a]s the various opinions in *Guardians* indicate, 'intentional discrimination' is treated as synonymous with discrimination resulting in 'disparate treatment,' which contrasts with 'disparate impact.'" (citing *Guardians*, 463 U.S. at 584 n.2)). The *Franklin* Court's reliance on *Guardians*, *see Franklin*, 503 U.S. at 74-75, reflects the Court's understanding that sexual harassment claims belong in the category of disparate treatment cases.

Because sexual harassment is by definition intentional discrimination — the person harassed would not have been harassed but for her gender — the concern about holding funding recipients liable for damages for disparate impact discrimination simply does not arise in cases involving

claims of sexual harassment.[7] The Fifth Circuit's reliance on *Franklin's* reference to "intentional" discrimination as a basis for rejecting agency principles under Title IX is therefore misplaced.[8]

B. Schools Should Be Liable for Sexual Harassment by Teachers Under the Standard Set Forth in Section 219(2)(d) of the Restatement of Agency

In the Title IX context, agency principles require holding schools liable for discrimination by teachers who use their authority to sexually harass their students. Under Section 219(2)(d) of the *Restatement (Second) of Agency* ("Section 219(2)(d)"), a school is liable for the unlawful acts of an employee who either (1) relies on the apparent authority of the school, or (2) is aided in accomplishing those acts by his or her relation to the school, regardless of

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[7] *See, e.g., Landgraf* v. *USI Film Products*, 511 U.S. 244, 264 (1994) (treating sexual harassment as intentional discrimination under Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072-74, 42 U.S.C. § 1981(a); *Henson* v. *City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982) (recognizing sexual harassment as a form of disparate treatment under Title VII); *Katz* v. *Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (same) ; *Andrews* v. *City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (recognizing sexual harassment as a form of intentional discrimination in the context of an equal protection claim).

[8] Because sexual harassment is intentional discrimination, the Court in this case, as in *Franklin*, need not address whether Title IX was enacted pursuant to the Spending Clause of the Constitution, Section 5 of the Fourteenth Amendment, or both. *See Franklin*, 503 U.S. at 75 n.8.

whether the school had notice of the wrongful acts.[9] The use of this standard appropriately recognizes the realities of teacher-student relations, the role of school authority in such relations, and the purposes of Title IX.

When a teacher engages in "quid pro quo" sexual harassment — *e.g.*, by threatening to lower a student's grades if the student does not submit to sexual advances — the harassment plainly is aided by the teacher's relation to the school (the teacher's actual authority to lower grades) and the school is therefore liable for the use of its authority to harass.[10] In cases of "hostile environment" sexual harassment, such as Alida Star Gebser's case here, the use of the teacher's authority to harass is no less powerful and insidious, and equally compels school liability under Section 219(2)(d). The two types of harassment — not

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[9] Section 219(2)(d) provides that a master is liable for the torts of his servants acting outside the scope of their employment when the servant "purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Restatement (Second) of Agency* § 219(2)(d) (1958).

[10] *See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039 (Mar. 13, 1997) [hereinafter *OCR Policy Guidance*]; *see also Kadiki* v. *Virginia Commonwealth Univ.*, 892 F. Supp. 746, 752 (E.D. Va. 1995) ("[A] professor is analogous to a work place supervisor, and knowledge of any *quid pro quo* harassment of a student by a professor should be imputed to his employer."); *cf. Horn* v. *Duke Homes*, 755 F.2d 599, 603-06 (7th Cir. 1985) (holding that Title VII imposes strict liability on an employer for sexual harassment by a supervisory employee).

always readily distinguishable — should be governed by the same standards.[11]

1. The Extensive Authority Teachers Wield Over Their Students Supports Liability Under Section 219(2)(d)

As the Second Circuit recognized in *Kracunas* v. *Iona College*, 119 F.3d 80, 88 (2d Cir. 1996), the power wielded by school teachers over their pupils is as great, if not greater, than the power of supervisors over their employees.[12] In *Kracunas*, the court held that the Section 219(2)(d) standard appropriately applies in the Title IX context. Accordingly, "if a [college] professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the

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[11] *See OCR Policy Guidance* at 12039; *cf. Jansen* v. *Packaging Corp. of America*, 123 F.3d 490, 566-70 (7th Cir. 1997) (*en banc*) (Wood, J., dissenting) (recognizing the overlapping nature of *quid pro quo* and hostile environment harassment in the Title VII context) *petition for cert. filed*, 66 U.S.L.W. 3283 (Sept. 29, 1997) (No. 97-569); Equal Employment Opportunity Commission, *Policy Guidance On* Current Issues of *Sexual Harassment*, Notice No. N-915-050, *EEOC Compliance Manual* (CCH) ¶ 3114 (Mar. 19, 1990) (same).

[12] *See also Patricia H.* v. *Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993) ("The distinctions between the school environment and the workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools"); Stacey, *supra* note 5, at 1354 (citing numerous reasons for requiring a stricter standard of liability for institutions in the educational context than that required for employers in the workplace); *Baker*, *supra* note 4, at 290-93.

professor's conduct." Id. at 88. Other lower courts have reached similar conclusions. See, e.g., *Hastings* v. *Hancock*, 842 F. Supp. 1315, 1319-20 (D. Kan. 1993) (finding Section 219(2)(d), as applied by the Tenth Circuit to claims under Title VII, applicable to a Title VII claim regarding teacher-student sexual harassment within a vocational training school).

In general, the courts have acknowledged the significance of the authority that teachers exercise over their students. The Seventh Circuit recently emphasized the implications of this power with respect to teacher-student sexual harassment in its opinion in *Mary M.* v. *North Lawrence Community School Corp.*, No. 97-1285, 1997 WL 763470 (7th Cir. Dec. 12, 1997):

> "The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its younger victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, '[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential

and receiving the most from the academic program.'"

Id. at *7 (quoting *Davis* v. *Monroe County Bd. Of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996) (citation omitted), *rev'd*, 120 F.3d 1390 (1997)).

Scholars who have studied sexual harassment on college campuses have found that teachers have power over their students in a number of ways. At the most fundamental level, professors award grades, write recommendations, and often shape the attitudes of professorial colleagues toward a particular student.[13] In addition, students' "adolescent idealism" often leads them to exaggerated views of a professor's wisdom and knowledge.[14] Further, because teachers have the power to "motivate students to master material or convince them to give up," professors are well-positioned to diminish or enhance a student's self-esteem.[15] These same considerations apply with even greater force to interactions between teachers and students in elementary and secondary schools.

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[13] Sue Rosenberg Zalk, *Men in the Academy: A Psychological Profile of Harassers, in Sexual Harassment on College Campuses* 81, 85 (Michele A. Paludi, ed. 1996); Vita C. Rabinowitz, *Coping with Sexual Harassment, in Sexual Harassment on College Campuses* 199, 200 (Michele A. Paludi, ed. 1996).

[14] Zalk, *supra* note 13, at 85; Rabinowitz, *supra* note 13, at 201.

[15] Zalk, *supra* note 13, at 86; Robert J. Shoop and Debra L. Edwards, *How to Stop Sexual Harassment in Our Schools* 62 (1994).

Indeed, for adolescents, "teachers are routinely seen by students as parent figures rather than peers."[16] Often, in their haste to "pull away from their parents," adolescent students project teachers into images of "perfection," and teachers who sexually harass their students capitalize on this.[17] Young students' immaturity -- both mental and sexual -- also exacerbates their vulnerability to teacher harassers. Elementary school-age children often are neither "cognitively capable of discerning the impropriety of a teacher's conduct nor capable of objecting to such conduct."[18] Moreover, students are not taught to scrutinize their teachers' behaviors for indications of impropriety. Rather, students are taught to obey their teachers just as they are instructed to obey other adults.[19] Aggregately, these factors elevate teachers to a unique position of authority in the minds of students.

The nature of the education process bears out students' subjective impressions and vests teachers with

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[16] Stefanie H. Roth, *Sex Discrimination i01: Developing a Title IX Analysis for Sexual Harassment in Education*, 23 J.L. & Educ. 459, 510 (1994).

[17] H.J. Cummins, *What's Normal? – And What's Not*, Newsday, May 27, 1995, at B1; *see also* Roth, *supra* note 16, at 511 (noting that many young women "ascribe exaggerated notions of superior experience, maturity, wisdom, and sophistication to their teachers and often accept everything that the teachers espouse as true or correct").

[18] Roth, *supra* note 16, at 510. *See also* Stacey, *supra* note 5, at 1372-73 ("Students, particularly those in elementary school, look to teachers for guidance and approval.").

[19] *See* Roth, *supra* note 16, at 510 (noting that young students "are taught to comply with the requests of parental authority figures, especially when they have been conditioned to believe that such figures would not do anything to harm them").

extensive actual authority over students' development and achievement. As one commentator has observed:

> By granting teachers the autonomy to define the contours of their professional role and encouraging the development of trusting relations between faculty and students as part of the learning process, educational institutions delegate enormous power to their instructors . . . . By further granting teachers the authority to evaluate and give feedback on students' work, schools heighten their instructors' power over their students.[20]

In this case, Waldrop's role as Gebser's mentor permeated all aspects of their relationship. Whether on campus or off, Gebser associated Waldrop with her school, and her responses to his advances were infected by that association. Particularly given her age, Gebser could not mentally sever Waldrop's harassment from his role as a teacher, and as a result, lacked the psychological basis to reject his advances or to report them without encouragement from other school authorities.

Given the realities of the teacher-student relationship in this case and in all others, the two-pronged basis for liability under Section 219(2)(d) -- for wrongs undertaken with apparent authority or facilitated by the wrongdoer's relation to the school -- properly applies under Title IX.[21]

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[20] *Id.* at 512-13.

[21] *See* Stacey, *supra* note 5, at 1373 ("The school imparts to its teachers the right to monitor and affect the day-to-day lives of the students. This delegation of control over the student, along with the unique teacher-student relationship, provides a basis for imposing liability on schools for the sexual misconduct of their teachers." (footnote omitted)).

Holding federally funded schools liable for sexual harassment aided by a teacher's actual or apparent authority will provide these institutions with an economic stake in implementing meaningful preventive policies and procedures, including counseling, monitoring, and appropriate punitive measures. Enforcing Title IX under the Section 219(2)(d) standard will encourage institutions such as the Lago Vista Independent School District to reach out to students like Gebser with advice about how to respond to sexual harassment *before* it occurs. Application of the Section 219(2)(d) standard thus has the socially desirable effect of helping deter sexual harassment and reduce its harms and associated costs. Plainly, schools are in a better position than students to reduce that risk. By allocating risk to the party best positioned to bear it, the Section 219(2)(d) standard therefore serves Congress' objective that Title IX eradicate all forms of sexual discrimination in federally funded education.[22]

2. *OCR's Adoption of the Section 219 (2)(d) Standard Is Entitled to Judicial Deference*

The Office for Civil Rights of the Department of Education ("OCR") has adopted the Section 219(2)(d) standard as part of its policy guidance construing Title IX's application to sexual harassment.[23] The OCR policy

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[22] *See* Stacey, *supra* note 5, at 1379; *cf. Horn* v. *Duke Homes*, 755 F.2d at 604 (relying on risk allocation theory in the context of Title VII and emphasizing that "[i]t was Congress' judgment that employers, not the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination").

[23] *OCR Policy Guidance* at 12039.

guidance "reflect[s] longstanding OCR policy and practice."[24]

The OCR policy guidance merits substantial deference by this Court. As the agency charged with Title IX's enforcement, the OCR is the government body in the best position to determine the statute's proper contours. In *Meritor*, the Court recognized that the Title VII policy guidelines of the Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[25] The general principle of judicial deference to an agency's interpretation of its own regulations and the statute it is charged to enforce also counsels in favor of deference to the OCR policy guidance. *See Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *see also Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565-70 (1980) (according deference to an agency's "official staff commentary" regarding statutory interpretation).

The Fifth Circuit, while refusing to apply the Section 219(2)(d) standard in *Rosa H.*, acknowledged in that case its position that "[i]n general, '[w]hen interpreting

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[24] *OCR Policy Guidance* at 12035. Notably, like the policy guidance on sexual harassment under Title IX, the OCR's policy guidance on racial harassment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7, the legislative precursor to Title IX, *see Cannon*, 441 U.S. at 694, adopts principles of agency applicable under Title VII. *See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448 (1994).

[25] *Meritor*, 477 U.S. at 65 (quoting *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

title IX we accord the OCR's interpretations appreciable deference.'" *Rosa H.*, 106 F.3d at 657 (quoting *Rowinsky* v. *Bryan Independent School District*, 80 F.3d 1006, 1015 n.20 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996)). However, the Fifth Circuit declined to accord such deference in *Rosa H.* on the ground that such action would involve applying the guidelines "retroactively." *Id.* This rationale ignores the fact that the OCR policy guidelines reflect the agency's longstanding interpretation of Title IX. The recent publication of the final guidelines is not a barrier to following the agency's interpretation in this case.[26]

C. Holding Schools Liable for Sexual Harassment by Their Agents Is Consistent with the Broad Language and the Legislative History of Title IX

The application of agency principles to hold schools liable for sexual harassment by teachers who misuse their authority is further supported by the broad scope and purpose of Title IX. Title IX focuses on the protected individual's rights, rather than on the perpetrator of the discriminatory acts.[27] This focus places responsibility on

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[26] *Cf. Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-58 (1978) ("[T]he longstanding administrative construction of a statute should 'not be disturbed except for cogent reasons.'") (quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921)); *Cowen* v. *Bank United of Texas FSB*, 70 F.3d 937, 943 (7th Cir. 1995) (rejecting objection to reliance on Federal Reserve Board "staff commentary" issued subsequent to alleged banking law violation because "the objection based on retroactivity falls away when the commentary . . . purported to clarify rather than to change existing law").

[27] Title IX provides: "No Person in the United States shall, on the basis of sex, be excluded from participation in, be denied

recipients of federal funds to provide a nondiscriminatory educational environment, and is inconsistent with a standard of liability that holds recipients accountable only for the discriminatory actions of their governing boards, and not for the acts of their agents.

In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court emphasized the significance of Title IX's focus on individual rights in finding that the statute provides for a private right of action. *See id.* at 690-93. The Court in *Cannon* noted that, during the legislative process that led up to the enactment of Title IX, an alternative wording was proposed that would have proscribed "any grant . . . [to] any institution of higher education . . . unless the application . . . for the grant . . . contains assurances . . . that any such institution . . . will not discriminate on the basis of sex in the admission of individuals." *Id.* at 693 n.14. The Court found Congress' rejection of this alternative language persuasive with respect to the inference of a private right of action. Similarly, the rejection of the alternative language and the statute's emphasis on protection for individuals from any sex-based discrimination under federally funded educational programs and activities indicate that Congress did not intend to relieve a school from responsibility for the discriminatory actions of individuals whom it has empowered to act on its behalf.

There is no basis for believing that Congress intended to provide students with less protection from discrimination under Title IX than it provided employees under Title VII. Indeed, by expressly defining a key purpose of Title IX as extending the protections of Title VII to the educational

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the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

setting, the House Report on Title IX suggests that Congress intended similar standards of institutional liability to apply under both statutes. The House report specifically states that:

> One of the single most important pieces of legislation which has prompted the cause of equal employment opportunity is Title VII of the Civil Rights Act of 1964 . . . . Title VII, however, specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.[28]

The fact that Title IX, unlike Title VII, does not use the term "agent," does not counsel against the application of agency principles under Title IX. Indeed, the breadth of Title IX's application to "any educational program or activity" indicates that the term "agent" would have been superfluous to render educational institutions liable for sexual harassment occurring, with or without the institution's knowledge, in the context of such programs and activities. *Kadiki* v. *Virginia Commonwealth University*, 892 F. Supp. 746, 754 (E.D. Va. 1995) (Title IX governs "any operation" of an educational institution and therefore "it is essentially inconsequential that Title IX does not expressly adopt agency principles"); *Hastings*, 842 F. Supp. at 1318 (rejecting the argument that the absence of the word "agent" in Title IX implies a barrier to the application of agency principles). If any implication is to be drawn from the absence of the word "agent" in

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[28] H.R. Rep. No. 92-554 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2512.

Title IX, it would be that institutional liability for sexual harassment is broader under Title IX than under Title VII.[29]

Congress has explicitly emphasized, through amendments to Title IX, that the statute's prohibition against discrimination "under any educational program or activity receiving Federal financial assistance" must be accorded a broad interpretation. In 1988, for example, in defining "program or activity" as "all the operations of . . . a college [or] university," Congress expressly directed that Title IX be accorded a "broad, institution-wide application."[30] This affirmative step by Congress strongly suggests that its intent would be thwarted if Title IX were narrowly read to insulate schools from liability for the discriminatory acts of their agents.[31]

Informed by Congress' deliberate acts, this Court and the lower courts have repeatedly stressed that the legislative history of Title IX dictates that the statute must be interpreted to the full breadth of its language. In addition to its interpretation of Title IX's breadth in *Cannon*, this Court

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[29] As this Court observed in *Meritor*, the inclusion of the reference to "agent" in Title VII implies a *limitation* on the liability of an employer for the acts of its employees: "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 72. Title IX, in contrast, includes no such limitation.

[30] 20 U.S.C. § 1687 (hist. and stat. notes).

[31] *See also* H.R. Res. 190, 98th Cong. (1983); 129 Cong. Rec. H33104 (1983). (Congressional resolution stating that Title IX and its regulations "should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.").

admonished in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 521 (1982), that "'if we are to give Title IX the scope its origins dictate, we must accord it a sweep as broad as its language'" (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)). To effectuate this determination and in light of the powerful role of school authority in teacher-student sexual harassment, it is imperative that Title IX be interpreted to impose liability on school districts under traditional principles of agency.

Consistent with the OCR policy guidance, this Court's prior opinions in sexual harassment cases, and Congress' goals for Title IX, the Court should follow the standard set forth in Section 219(2)(d) of the Restatement and hold that a school district is liable for teacher-student harassment that is either undertaken with actual or apparent authority or is aided by the teacher's relation to the school.

II. EDUCATIONAL INSTITUTIONS SHOULD BE LIABLE UNDER TITLE IX IF THEY FAIL TO PROVIDE EFFECTIVE MEANS FOR REPORTING AND ADDRESSING SEXUAL HARASSMENT, EVEN IF THE HARASSER DID NOT ACT AS AN AGENT OF THE INSTITUTION

In addition to being responsible for the acts of their agents, schools are liable under Title IX for their own wrongful actions. Schools should be liable if they knew or should have known that sexual harassment was occurring in their federally funded programs or activities, but failed to take immediate and appropriate action to end it.[32] Even

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[32] The "knew or should have known" (actual or constructive notice) standard is grounded in traditional principles of agency. *See Restatement (Second) of Agency* § 219(2)(b).

absent actual notice of harassment, schools, like employers, should be held accountable under a constructive notice standard if they fail to take reasonable action to discover and remedy sexual harassment in their programs or activities.

Because sexual harassment is eminently foreseeable,[33] an educational institution, such as the Lago

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[33] Studies have found that the vast majority of female high school students are victims of school-related sexual harassment during their high school careers. In a 1993 survey, 85% of female respondents reported having experienced some form of unwanted sexual behavior directed toward them, and 65% reported that they had been touched, grabbed, or pinched in a sexual way. The American Association of University Women Educational Foundation, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* 7-8 (1993) [hereinafter *Hostile Hallways*]. In 1996, a reanalysis of the data from *Hostile Hallways* revealed that, of students who reported experiencing sexual harassment, 44% reported harassment by a member of the school staff other than the principal; 16% reported harassment by a teacher and 2% reported harassment by a principal. *See* Valerie Lee et al., *The Culture of Sexual Harassment in Secondary Schools*, 33 Am. Educ. Res. J. 2 (1996). Similarly, a 1995 Connecticut study reported that 92% of female respondents experienced unwanted sexual behavior directed toward them and 65% reported having been touched, pinched, or grabbed in a sexual way. Permanent Commission on the Status of Women, *In Our Own Backyard: Sexual Harassment in Connecticut's Public High Schools* 10, 12 (1995). In a 1997 Texas study involving grades 7-12, 76% of female respondents reported having suffered pressure to perform a sexual act. Texas Civil Rights Project, *Peer Sexual Harassment: A Texas-Size Problem* 13 (1997). These data also are consistent with studies of sexual harassment at the collegiate level, which have found that almost 70% of female undergraduates experience some form of sexual harassment during their four years of college. Michele A. Paludi, *Editor's Notes, Sexual*

Vista Independent School District, that fails to establish and disseminate an effective policy and procedures for reporting and responding to incidents of sexual harassment should be deemed to have constructive notice of any such harassment that occurs. Application of this standard is imperative to prompt schools to take responsible action to find out about and appropriately address sexual harassment, and thereby to achieve Congress' intent that Title IX root out all forms of sexual discrimination in federally funded educational settings.

As discussed above, following this Court's reference in *Franklin* to the standards articulated in *Meritor*, most of the circuit courts have correctly interpreted Title IX to impose liability on educational institutions under similar agency principles as apply to employers under Title VII. *See supra* note 7. Under well-established Title VII case law, employers are liable for hostile environment sexual harassment when they knew or should have known about the harassment and failed to take appropriate actions to address it.[34] Recognizing Title VII as an appropriate analogue, and based on this Court's opinion in *Franklin*, OCR has adopted the constructive notice standard as part of its Title IX policy guidance.[35]

Harassment on College Campuses 3, 5 (Michele A. Paludi, ed., 1996). *See also,* Roth, *supra* note 16, at 460 (noting that at least one study has found that "between twenty and thirty percent of all female undergraduate students reported having some form of sexual harassment by the faculty and staff of their colleges or universities").

[34] *See, e.g., Ellison* v. *Brady*, 924 F.2d 872 (9th Cir. 1991); *Hall* v. *Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *cf. Snell* v. *Suffolk County*, 782 F.2d 1094 (2d Cir. 1986) (racial harassment).

[35] *OCR Policy Guidance* at 12039.

In this case, Lago Vista's failure to establish and disseminate a policy and procedure for reporting sexual harassment establishes constructive notice because, through that failure, Lago Vista violated its duty to exercise "reasonable care" to find out about the harassment.[36] Lago Vista had no meaningful process whereby Gebser might have sought protection from the harassment to which she was subjected. Because the school district violated its duty to establish and disseminate a policy prohibiting sexual harassment and reasonable procedures for reporting incidents of harassment, Gebser was effectively prevented from seeking help or redress from the school. Indeed, the very failure of the school district to establish a policy and procedure for reporting sexual harassment itself violated Title IX.[37]

Placing schools on constructive notice of sexual harassment based on their failure to issue effective policies and grievance procedures gives schools an incentive to provide meaningful channels for reporting incidents of sexual harassment, and thereby helps send a message to all school employees and students that harassment will not be tolerated. Holding schools liable for failure to provide adequate antiharassment policies and reporting procedures is thus critical to accomplish Congress' objectives.

Such an incentive can also help schools to prevent and remedy sexual harassment. In fact, experience has shown that schools' actions, including adopting and implementing a clear sexual harassment policy and grievance procedures, can reduce the incidence of sexual harassment.[38] Counseling and other prevention programs

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[36] *Id.* at 12042.

[37] *See* 34 C.F.R. § 106-8(b); *OCR Policy Guidance* at 12044.

[38] *See, e.g.,* Elizabeth A. Williams et al., *Impact of a*

also have proven extremely valuable in sensitizing teachers and other school employees to the many forms and harms of sexual harassment, and thereby in reducing the incidence of such harm.[39] School employees may be uncertain how to deal with sexual harassment complaints precisely because schools have neglected to inform and train employees and articulate policies against sexual harassment. As has been demonstrated in the employment context, institutions that maintain effective reporting procedures have less frequently been subject to litigation stemming from incidents of harassment.[40]

University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 57, 59, 62-63 (1992) (finding that continuing and intensive sexual harassment education increased awareness and reduced sexual harassment in schools); Shoop and Edwards, *supra* note 15, at 141-58 (discussing successful programs of sexual harassment prevention).

[39] *See* Anne Bryant, *Sexual Harassment in School Takes Its Toll*, 123 USA Today Magazine 40 (Mar. 1995). *See also* Tasha Lebow, *Successful Harassment Prevention Programs*, 4 Equity Coalition 29 (Spring 1996) (noting that "[i]nstituting prevention strategies insures the most effective use of school time and resources by defusing conflicts before they escalate into serious incidents").

[40] For example, a recent American Management Association study showed that companies that had sexual harassment training programs were less likely to see claims develop into lawsuits. *See Crackdown on Sexual Harassment*, CQ Researcher 625, 633-34 (Vol. 6, No. 27) (July 19, 1996). Other commentators similarly have concluded that a prevention program, including well communicated policies and effective training programs, is the single most important solution to reducing sexual harassment at work. *See* Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, 3 Kan. J.L. & Pub. Pol'y 57, 74 (1994); Ellen J. Wagner, *Sexual Harassment in the Workplace* 110, 119 (1982).

The emotional, physical and educational harm to students who are sexually harassed, as well as the prevalence of sexually harassing conduct, is well documented.[41] But the harm of sexual harassment does not result only from the incident itself. It is exacerbated by schools' failure to adequately respond to the problem.[42] For this reason, schools must be held to have constructive notice of sexual harassment if they fail to make all reasonable efforts to discover sexual harassment, including establishing and distributing effective policies and procedures addressing sexual harassment and appropriate measures to minimize consequent harms.

A standard of constructive notice under Title IX is particularly essential because many -- if not most -- students may be afraid to report incidents of sexual harassment by teachers and other school employees. Survey data confirms that "students do not routinely report sexual harassment incidents to adults."[43] Fear of retaliation or isolation is a familiar culprit. Some victims do not report harassment out of fear they will be accused of having caused the harassment. In fact, students who report

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41 *See, e.g.*, Bernice R. Sandler, *The Chilly Classroom Climate: A Guide to Improve the Education of Women*, 15-17, 19 (Nat'l Ass'n for Women in Educ. 1996) (sexually offensive hostile environments may reduce female students' class participation and even cause women to drop out of classes entirely); *Hostile Hallways*, *supra* note 33, at 16-17 (64% of the girls who had been harassed reported suffering from embarrassment; 52% of them reported feeling self-conscious; 43% of them felt less sure or less confident about themselves; and 30% of them doubted whether they could ever have a happy romantic relationship).

42 *See* Roth, *supra* note 16, at 466-69 (1994).

43 *Hostile Hallways*, *supra* note 33, at 14.

incidents of sexual harassment by a teacher commonly face ostracism by students, teachers, and others in the community.[44] Many students blame themselves for causing harassment.[45] In lieu of reporting incidences of sexual harassment, students resort to a variety of coping strategies.[46] Courts should not permit schools to capitalize on students' reluctance to report sexual harassment by limiting schools' liability to instances where they have actual notice.

By rejecting a constructive notice standard and limiting school liability to instances of actual notice,[47] the Fifth Circuit has created the perverse incentive for schools to ignore indicia of sexual harassment and discourage students from reporting incidents of harassment.[48] Schools held to the Fifth Circuit's standard will simply bury their heads in the proverbial sand, allowing sexual harassment to proceed unchecked and unaddressed. Congress cannot

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44 Carol Shakeshaft and Audrey Cohan, *Sexual Abuse of Students by School Personnel*, 76 Phi Delta Kappan 512, 519 (1995).

45 *See* Eleanor Linn et al., *Bitter Lessons for All: Sexual Harassment in Schools*, in James T. Sears, ed., *Sexuality and the Curriculum: The Politics and Practices of Sexual Education* (1992).

46 Vita C. Rabinowitz, *supra* note 13, at 204-206.

47 *See Doe* v. *Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (1997); *Rosa H.*, 106 F.3d at 656.

48 Indeed, even with respect to actual notice, the Fifth Circuit adopted an overly restrictive standard that effectively negates Title IX's prohibition of sexual harassment. *See Canutillo Indep. Sch. Dist.* v. *Leija*, 101 F.3d 393, 398-400 (5th Cir. 1996) (holding that notice to a homeroom teacher did not constitute actual notice to school district).

have intended that Title IX be interpreted to allow such a result.[49]

CONCLUSION

This Court should reverse the decision of the Fifth Circuit below and, consistent with its own precedent and Congress' intent, hold that federally funded educational institutions may be liable under Title IX based on agency principles, including for teacher-student harassment facilitated by actual or apparent authority and for failure to take reasonable action to discover and address sexual harassment within their programs and activities.

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[49] While a school's failure to establish reasonable procedures for reporting sexual harassment renders it liable under Title IX, the existence of such procedures will not immunize the school from liability where the harasser acted as an agent of the school, or where the school otherwise had actual or constructive notice of the harassment, yet failed to take prompt and appropriate corrective action. *See OCR Policy Guidance* at 12039-40; *cf. Meritor* (mere existence of a grievance procedure does not shield an employer from liability for sexual harassment). Indeed, because of the reluctance of students to report sexual harassment by teachers and other school authorities, providing such immunity would eviscerate Title IX's protection against sexual harassment.

Respectfully submitted,

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January 16, 1998

Appendix

Alida Star Gebser and
Alida Jean McCullough* v. *Lago Vista
Independent School District

Amici Statements of Interest

The *National Women's Law Center ("Center)* is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from al facets of American life. Since its inception in 1972, the Center has worked continuously to ensure equal educational opportunities for girls and women through legislative and administrative advocacy, public education and litigation to enforce Title IX. The Center has been a leader in advocating for the full enforcement of Title IX, and has actively participated in Congressional efforts to amend the Act and every Supreme Court case interpreting Title IX, including filing the lead *amicus* brief in *Franklin* v. *Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992). The Center is counsel in *Davis* v. *Monroe County Bd. Of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (1997), Petition for a Writ of Certiorari filed Nov. 19, 1997, No. 97-843, a peer sexual harassment case involving similar issues of Title IX's application to sexual harassment in schools. In addition, the Center has played a major role in shaping the law of sex discrimination and sexual harassment in the workplace under Title VII, participating as *amicus* in every Title VII sex discrimination case in the Supreme Court, including *Meritor Savings Bank* v. *Vinson, 477 U.S. 57 (1986), and* Harris v. *Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), and in numerous sexual harassment cases in the lower courts. The Center has a deep and abiding interest in ensuring that

women and girls have access to a school environment that is free from sexual harassment and abuse.

For well over a century, the *American Association of University Women ("AAUW")*, an organization of 160,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,600 communities across the country, AAUW members work to promote education and equity for all women and girls. Current legislative priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW believes that Title IX is essential for continuing the advancement of women and girls in education. As a leader of several coalitions, AAUW plays a major role in activating advocates nationwide for AAUW's priority issues.

The *California Women's Law Center ("CWLC")* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: sex discrimination, including sex discrimination in education, reproductive rights, family law, violence against women, and child care.

The *Center for Women Policy Studies ("Center")* is a national, nonprofit, multiethnic and multicultural feminist policy research and advocacy institution. The Center has been a leader in research, policy analysis and advocacy on violence against women since its founding in 1972. In 1993, the Center began an examination of girls' experience with violence. To bring the voices of girls and teenage women into the public policy debate about youth violence, the Center conducted focus group research and a national survey of readers of two girl-focused magazines. Based on

its research, the Center believes that there is an important connection between girls' victimization and their increasing willingness to fight back through violence. A major goal of the Center's work is to advocate for policies in schools that seriously confront and stop girls' victimization as soon as it starts.

The purpose of the *Clearinghouse on Women's Issues* is to exchange and disseminate educational information and materials on issues related to discrimination on the basis of race, sex, age or marital status, with particular emphasis on public policies affecting the economic and educational status of women. The organization may take action or positions in the name of the group, and it provides information to member organizations and individuals on specific issues.

The *Connecticut Women's Education and Legal Fund, Inc. ("CWEALF")* is a nonprofit, women's rights organization incorporated in 1973. With a present membership of over 1,400, CWEALF's mission is to end sex discrimination and to empower all women to be full and equal participants in society through a combination of the law, public policy and community education. For most of its history, CWEALF has worked on the issue of sexual harassment by providing one-on-one assistance to women and by offering workshops on sexual harassment prevention to schools and businesses. From the thousands of women who call CWEALF with stories of sexual harassment and the countless number of students who have related their personal accounts, the organization is well aware of the devastating impact of such behavior and is committed to eradicating it.

Now in its twenty-fourth year, *Equal Rights Advocates ("ERA")* is one of the country's oldest women's law

centers. ERA is dedicated to empowerment of women through the establishment of their economic, social and political equality. Beginning in 1974 as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues including litigation, advice and counseling, public education and public policy initiatives. Since its early days, ERA has worked to end sexual harassment. ERA represented the plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, *Miller* v. *Bank of America*, 600 F.2d 211 (9th Cir. 1979). More recently, ERA filed an *amicus* brief before the United States Supreme Court in *Harris* v. *Forklift Sys. Inc.*, 510 U.S. 17 (1993). ERA was co-counsel in *Doe* v. *Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), and has appeared as *amicus* in numerous cases concerning girls' rights to be free from sexual harassment and sexual discrimination in the schools, including *Franklin* v. *Gwinnett County Pub. Sch. Dist.*, 503 U.S. 60 (1992), and *Davis* v. *Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996).

Since 1899, the *National Association for Girls and Women in Sport ("NAGWS")* has championed equal funding, high quality, and respect for women's sports programs and generally has promoted opportunities for girls and women in education and athletics. NAGWS is a nonprofit, educational organization whose members are administrators, teachers, coaches, and officials. Therefore, we are naturally concerned with the outcome of this particular case in the education sphere. The ramifications of Title IX decisions may affect not only the world of academia but also the world of athletics. A level playing field cannot be created for women in sport or society if the school systems in which our children are taught do not have

policies for receiving and addressing sexual harassment complaints. Without a way to voice complaints in sexual harassment cases, which overwhelmingly victimize women, girls and women will remain silenced. A finding for the plaintiff in *Alida Star Gebser and Alida Jean McCullough* v. *Lago Vista Independent School District* will reinforce our efforts to provide a level playing field for girls and women.

The *National Coalition for Sex Equity in Education ("NCSEE")* is an organization of educators and gender equity advocates from across the United States. Its purpose is to provide leadership in the identification and in the infusion of sex equity into all educational programs and processes. In recent years, NCSEE has been actively involved in providing technical assistance and training to school districts on how to address and prevent sexual harassment in schools. NCSEE believes that a school district should be liable when a teacher uses his or her delegated authority to harass a student or when the school knew or should have known of the harassment and failed to take prompt and appropriate action.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national, nonprofit, civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is to eliminate barriers that deny women and girls equal opportunities, such as sexual harassment. For years, NOW LDEF has fought for educational equity for girls. In April 1993, NOW LDEF and the Wellesley College Center for Research on Women released results of a survey on sexual harassment in schools. NOW LDEF was co-counsel in

Doe v. *Petaluma City School District*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case in which a court recognized that a school's failure to respond to peer sexual harassment may violate Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sexual harassment and sex discrimination in the schools, including *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), and many appellate court decisions concerning school liability under Title IX for sexual harassment of students. NOW LDEF currently is "of counsel" in *Faragher* v. *City of Boca Raton*, a workplace sexual harassment case pending before this Court, which raises many of the same liability issues before the Court here.

The *Southern Coalition for Educational Equity ("SCEE")*, founded by Winifred Green in November 1978, has as its goal increasing options for all children by assuring access to high quality education, health care, and early intervention programs. The primary emphasis of the SCEE has been to make public schools safe, effective, humane institutions that increase options for all children. From its earliest days, and increasingly in the past five years, the SCEE's programs and projects have sought to address in a more comprehensive manner the problems of children and families.

Wider Opportunities for Women ("WOW") is a national, nonprofit organization, based in Washington, DC, which works to achieve economic independence and equality of opportunity for women and girls. WOW considers sexual harassment to be a barrier to women's educational and workplace equity, and the organization has repeatedly worked to support the safety of women and girls in both work sites and education settings. WOW views sexual

harassment in the classroom as the stage-setter for harassment that occurs in other sectors of society and has long supported the notion that employers are liable for the actions of their employees in cases of this type. For these reasons, we are interested in and have joined the *amicus* brief for *Alida Star Gebser and Alida Jean McCullough* v. *Lago Vista Independent School District*.

Women Employed is a national organization of working women, based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to under Title IX is equal educational opportunity, free from sexual harassment. From experience counseling both students and school districts committed to preventing sexual harassment, Women Employed submits that the only way to achieve this guarantee is to hold the school district liable where a teacher invokes his or her delegated authority, either implicitly or explicitly, to sexually harass a student, or where the school district knew or should have known of harassment and failed to take action.

The *Women's Law Project ("WLP")* is a nonprofit, public-interest legal center located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP is committed to ending the sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual

abuse. Toward that end, the WLP is interested in ensuring a proper remedy for students who are subject to sexual harassment.

The *Women's Legal Defense Fund ("WLDF")* is a nonprofit, national advocacy organization founded in 1971 to advance the rights of women. WLDF promotes fairness in the workplace, quality health care, and policies that help women and men meet both work and family responsibilities. WLDF volunteer lawyers represented the plaintiff in *Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977), one of the first federal appellate holdings that sexual harassment may violate Title VII of the 1964 Civil Rights Act, and have participated as *amicus curiae* in every sexual harassment case that has come before the U.S. Supreme Court.

The *YWCA of the U.S.A.* is the oldest women's membership organization in the nation. Founded in 1858, it currently serves over two million girls, women and their families through 400 YWCAs in 4,000 locations across the country. Strengthened by diversity, the Association draws together members who strive to create opportunities for women's growth, leadership and power in order to attain a common vision: peace, justice, freedom and dignity for all people. Because we advocate for public policies that ensure women who have been sexually harassed the right to equal protection and the avoidance of further abuse, the YWCA of the U.S.A. supports the position taken in this *amicus curiae* brief.

(9)

No. 96-1866

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1997

ALIDA STAR GEBSER AND
ALIDA JEAN MCCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

INTEREST OF *AMICUS CURIAE*[1]

Amicus, the American Insurance Association ("AIA"), is a national trade association representing more than 300 major companies writing property and casualty insurance policies throughout the United States. Its members constitute more than 48% of the market share for multi-peril coverage throughout the United States.

AIA regularly files *amicus curiae* briefs in cases that will have a significant impact on its members. In this case, AIA and its members have a vital interest in maintaining school environments that are free from sexual harassment. At the same time, *amicus* and its members also have a substantial interest in clarifying the Title IX standard of liability. An appropriate standard would avoid needless litigation, and at the same time would ensure that liability is not extended beyond the point necessary to provide effective incentives to address the serious issue of sexual harassment.

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681-1688, provides a private right of action for claims of gender discrimination, including sexual harassment. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Courts are split, however, concerning the standard under

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[1]No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amicus* and its counsel made any monetary contribution to its preparation or submission. Both parties consent to the filing of this brief.

which education programs and activities are liable in these individual actions. In several cases, including a prior opinion of the court below, Title IX was construed to provide monetary remedies only for claims of intentional discrimination, limited to situations in which an education program had actual knowledge of alleged harassment. Other courts, however, have held that Title IX should import employer liability standards directly from Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-1 *et seq*.

Title IX, *amicus* submits, reveals a far narrower legislative purpose than Title VII. It does not broadly prohibit all sex discrimination in education programs or even demand that any particular education program cease discriminating; it merely requires education programs accepting federal funds to make a promise concerning gender discrimination. The "contractual" nature of this promise, apparent not only from the statutory text but also from the legislative history, typifies enactments under Congress' Spending Clause power. It would make little sense to hold a program liable for breaching its contractual obligation when the individuals statutorily responsible for making the commitment -- officials in charge of the program's "operations" -- were unaware of the alleged breach. Nor does this Court's Spending Clause precedent permit such a counterintuitive result.

All Spending Clause cases must start from the presumption, recognized in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), that monetary remedies are unavailable except as unambiguously indicated by Congress. In the Title IX context, the Court has been willing to override this presumption only when the claim involves "intentional

discrimination." *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74-75 (1992). The Court had no choice but to analyze *Franklin* as an intent case because facts indicating knowing discrimination were alleged in the complaint, assumed as true by the trial court in granting a motion to dismiss, and posited as understood in the question accepted on *certiorari*. A finding of intent by operation of law, by contrast, would effectively nullify the *Pennhurst* presumption by making every harassment case actionable, regardless of the knowledge, conduct, or actual intent of the school's administrators.

Phrasing differences between the anti-discrimination provisions of Title VII and Title IX do not evidence a broader intent, because the text of Title IX specifically defines and limits the "education program" responsible for the contractual commitment not to discriminate. Nor are belatedly issued administrative guidelines from the Department of Education controlling in light of their ambiguity, inconsistency with prior agency pronouncements, and conflicts with existing case law and demonstrable congressional intent. This Court, therefore, should affirm the holding of the court below.

ARGUMENT

I. TITLE IX, AS A SPENDING CLAUSE ENACTMENT, PRECLUDES DAMAGES FOR ALLEGED DISCRIMINATION WHEN INTENT, ABSENT IN REALITY, CAN BE INFERRED SOLELY BY OPERATION OF LAW

In 1979, this Court authorized private lawsuits under Title IX, which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see Cannon v. University of Chicago*, 441 U.S. 677 (1979). Thirteen years later, the Court held that monetary relief may be available in Title IX private actions. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Significant disagreements have developed, however, concerning the standard for determining damage liability. Several courts have held that Title IX should incorporate, essentially without exception, the rules governing employer liability under Title VII. *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899-900 (1st Cir. 1988); *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Brzonkala v. Virginia Polytechnic Institute & State University*, Nos. 96-1814, 96-2316, slip op., at *6 (4th Cir. Dec. 23, 1997) (1997 WL 785529) (to be reported at 132 F.3d 949); *Doe v. Claiborne County*, 103 F.3d 495, 514-15

(6th Cir. 1996); *Kinman v. Omaha Public School District*, 94 F.3d 463, 469 (8th Cir. 1996).[2]

On the other hand, three circuit court decisions, including a prior opinion of the court below, distinguish Title IX from Title VII because the former statute was enacted pursuant to Congress' authority under the Spending Clause of the Constitution, Art. 1, § 8, cl. 1. Based on relevant Supreme Court precedent, these courts have held that Title IX cannot support liability unless the education program breached its commitment not to discriminate with actual notice of the alleged misconduct. *See Rosa H. v. San Elizario Independent School District*, 106 F.3d 648, 652-53 (5th Cir. 1997); *Smith v. Metropolitan School District of Perry Township*, 128 F.3d 1014, 1034 (7th Cir. 1997); *Floyd v. Waiters*, No. 94-8667, slip op., at *4 (11th Cir. Jan. 20, 1998) (1998 WL 17093).

Amicus believes that a Spending Clause analysis accurately reflects not only the proper source of congressional authority, but also the narrower purpose

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[2]Although these courts agree (wrongly) that Title IX should apply principles from Title VII, they do not concur on the proper standard to borrow. The courts in *Lipsett*, *Brzonkala*, *Doe*, and *Kinman* would find liability under Title IX only if an education program's administrators knew or should have known of the harassment but failed to respond -- a test that would absolve Respondent from liability if applied to the trial court's findings in this case. *See infra* note 6. The court in *Kracunas*, on the other hand, would apply a more stringent standard approaching strict liability. This uncertainty will be resolved when the Court considers the corresponding Title VII standard this Term in *Faragher v. City of Boca Raton*, 118 S. Ct. 438 (No. 97-282), *granting cert. to* 111 F.3d 1530 (11th Cir. 1997).

that Congress envisioned when it enacted Title IX.[3] Properly applied, such an analysis inescapably leads to affirmance of the court below.

A. Title IX, Enacted Pursuant to Congress' Spending Clause Powers, Is Far Narrower Than Title VII In Sweep And Purpose

Title IX certainly expresses a strong congressional policy against sex discrimination. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982) (stating that courts should accord Title IX "a sweep as broad as its language"). Even stronger language has been used to describe the legislative purpose of Title VII. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) ("Title VII is a broad remedial

[3]Many courts have reflexively imported Title VII principles into Title IX without thorough analysis or any consideration of differences between the two statutes. Several courts, for example, have accepted Title VII as a guidepost for Title IX merely because both statutes regulate the general subject of sex discrimination. *See, e.g., Lipsett*, 864 F.2d at 896 ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, . . . [it is] the most appropriate analogue when defining Title IX's substantive standards."). Others have attached undue significance to this Court's citation, in *Franklin*, of a single Title VII case. *See, e.g., Brzonkala*, slip op., at *5 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), as cited in *Franklin*, 503 U.S. at 75). The quote in question stood only for the unremarkable proposition that sexual harassment constitutes gender discrimination, conceded by the defendant in *Meritor*. *See* 477 U.S. at 64. The Court's statement in *Franklin* that "the same rule should apply when a teacher sexually harasses a student," therefore, does not establish that other vigorously contested doctrines, including *respondeat superior*, see *id.* at 70, have also been approved.

measure, designed 'to assure equality of employment opportunities.'") (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) (Title VII demands "[u]nrelenting broad-scale action against patterns or practices of discrimination") (quoting H.R. Rep. No. 92-238, 92d Cong., 1st Sess., at 14 (1971)).

What truly separates Title IX from Title VII, however, is the many ways in which Title IX falls short of Title VII's "central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Landgraf v. USI Film Products*, 511 U.S. 244, 254 (1994) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)). To begin with, Title IX does not apply to all educational institutions "throughout the economy"; it only regulates "education programs and activities receiving Federal financial assistance." 20 U.S.C. § 1681(a). Congress' primary interest in regulating such programs, moreover, is not "making persons whole for injuries suffered through past discrimination," but ensuring that federal funds are not used to support discriminatory practices. *See Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 595 (1983) (White, J.) ("make whole" remedy not provided under Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d-1 *et seq.*, the race, color, and national origin counterpart of Title IX).[4]

[4]The Court in *Cannon* also found that Congress sought, through Title IX, to "provide individual citizens effective protection against [discriminatory] practices." 441 U.S. at

[Footnote continued on next page]

Thus, rather than broadly decreeing that specified practices will be illegal, as a Commerce Clause, Fourteenth Amendment, or similar enactment might do, Title IX gives educational institutions or systems an option to continue discriminatory practices if they wish. The *only* stipulation imposed by Title IX is that programs choosing to accept federal funds must make a commitment not to discriminate based on sex. *See* 118 Cong. Rec. 5806-07 (1972) (statement of Rep. Mink) ("Any college or university which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination.")

[Footnote continued from previous page]

704. The purpose of individual relief, however, was not to provide make-whole remedies for their own sake, but rather to ensure "orderly enforcement of the statute," *id.* at 706, by "protect[ing] the individual from some power complex." *Id.* at 704 n.36 (quoting 110 Cong. Rec. 7062 (1964) (statement of Rep. Lindsay)). It is far from clear, moreover, that the congressional debate cited in support of this proposition relates at all to Title VI, whose legislative history the Court found relevant because of its similarity to Title IX. Passages immediately preceding and following Rep. Lindsay's remarks describe other specific provisions of the Civil Rights Act of 1964, also in the proposal under debate, which not only are entirely distinct from Title VI but also incorporate explicit individual remedies. *See* 110 Cong. Rec. 1540 (describing the bill before Congress as prohibiting discrimination "because of race or religion," an apparent reference to Title VII, which encompasses religion, and not Title VI, which does not); *id.* (describing "injunctive processes that are provided in this bill," which are absent from Title VI but are explicitly made available to private plaintiffs in Title VII, 42 U.S.C. § 2000e-5(g)); *id.* at 1541 (describing Title II, pertaining to public accommodations).

(quoted in *Cannon v. University of Chicago*, 441 U.S. 677, 703 n.36 (1979)).

Education programs that accept government assistance thus make "contracts" under Title IX not to engage in gender discrimination. *Floyd v. Waiters*, No. 94-8667, slip op., at *4 (11th Cir. Jan. 20, 1998) (1998 WL 17093). This very contractual nature is what defines enactments pursuant to the Spending Clause of the Constitution, Art. 1, § 8, cl. 1. *See Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."). There can be little doubt, in light of this structure, that Title IX is properly classified as an exercise of Congress' Spending Clause power. *See Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 599 (1983) (White, J.) (Title VI is "a typical 'contractual' spending power provision"); *Cannon*, 441 U.S. at 684-85, 690 (noting that Title IX "was patterned after Title VI," and relying in part on the "remarkably similar" dispositive language of those provisions to justify a private right of action under Title IX).

B. Sweeping Remedies For Acts Entirely Unknown To The Entities That Made Contractual Commitments Upon Receiving Federal Funds Are Inappropriate Under The Spending Clause

In addition to stipulating that every recipient of federal education funding must enter into a contract not to discriminate, Title IX explicitly defines the obligor for that contract as the "education program or activity"

receiving federal funds. 20 U.S.C. § 1681(a). The identity of this obligor is further explicated in Title IX's definition of "program or activity," which refers directly to the "operations" of the institution or system receiving such funds. *Id.* § 1687.[5] This provision clearly suggests that Congress wanted a commitment from officials who have the power, on behalf of all an education program's operations, to address discrimination. Such officials include members of the boards and individual administrators who run the "operations" of an institution or school system. *See Smith*, 128 F.3d at 1024 ("local education agency," the particular type of program at issue in that case -- and this one -- consists only of administrative boards and personnel, citing 20 U.S.C. § 8801, cross-referenced in section 1687). They do not encompass teachers or other subordinates. *Id.*

Thus, the text and legislative history of Title IX support liability under the Spending Clause only if an education program's administrators have breached their commitment to address discrimination. It is reasonable

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[5]Section 1687 was added to Title IX in 1988 in response to *Grove City College v. Bell*, 465 U.S. 555 (1984), which Congress believed had interpreted the term "education program or activity" too narrowly. Pub. L. No. 100-259, 100th Cong., 2d Sess. (1988). Congress' concern, however, was that Title IX should be interpreted to forbid gender discrimination "institution-wide" rather than only in the particular department that received federal money. S. Rep. No. 64, 100th Cong., 2d Sess. (1987), *reprinted at* 1988 U.S.C.C.A.N. 3. The legislative history of section 1687, however, does not suggest that Congress was interested in regulating anything other than the institution-wide group of "operations" associated with a program and the individuals and boards who administer them.

to conclude that this commitment has been breached if these individuals intentionally discriminated, either directly or through a conscious decision not to intervene after harassment was brought to their attention. It is not reasonable to conclude that these individuals breached their commitment if they never knew of the incident in question.

This same result is compelled by this Court's own consideration of Spending Clause enactments. In *Pennhurst*, this Court held that monetary remedies are presumptively precluded under the Spending Clause unless the statutory text or legislative history unambiguously suggest otherwise. 451 U.S. at 17-18. This unambiguous evidence was absent in *Pennhurst*, which involved an alleged failure to live up to vague commitments concerning the treatment of mentally retarded patients.

The requisite indication of congressional purpose was similarly found lacking for disparate impact claims under Title VI, whose legislative history the Court found so instructive in *Cannon*. Beginning from the proposition that Title VI is "a typical 'contractual' spending power provision," *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 600 (1983) (White, J.), Justice White's opinion for a divided Court concluded that there was no "persuasive evidence of contrary legislative intent" to provide a remedy. *Id.* at 599 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979)). The minimal legislative history that was available, in fact, "'weigh[ed] against the implication of a private right of action for a monetary award in a case such as this,' at least absent proof of intentional discrimination." *Id.* at 600 (citation omitted) (quoting *Transamerica*, 444 U.S. at 20).

This opinion, and the Court's later dictum in *Franklin* that monetary damages should be denied under the Spending Clause "when the alleged violation was unintentional" but not when "intentional discrimination is alleged," 503 U.S. at 74-75 (emphasis added), explain why the court below was fully justified in disallowing broader Spending Clause recoveries. It simply is not enough to say, like the United States as *amicus curiae*, that the far-reaching tort law doctrine of *respondeat superior* existed when Title IX was passed, and should have put education programs on notice that they would be subject to strict liability. Brief for the United States as *Amicus Curiae* ("U.S. Br.") at 27. The *respondeat superior* doctrine has not even gained general acceptance in the broader context of Title VII, as demonstrated by the Court's recent grant of *certiorari* in *Faragher v. City of Boca Raton*, 118 S. Ct. 438 (No. 97-282), *granting cert. to* 111 F.3d 1530 (11th Cir. 1997). Thus, there is an utter lack of any evidence -- much less the unambiguous, "persuasive" evidence necessary to overcome the *Pennhurst* presumption -- establishing that Congress wanted to apply such sweeping doctrines to the far narrower and more specific provisions of Title IX.

Nor can *Franklin* be read to circumvent the force of the Court's carefully drawn distinction between intentional and unintentional conduct by automatically deeming every teacher harassment claim to be an intentional act of the school system. The discussion in *Franklin* does not reflect the Court's own finding that intentional discrimination occurred; it merely acknowledges, in response to arguments submitted by the parties and *amici*, that intentional discrimination was "alleged." 503 U.S. at 75. The court had little choice but to do so, since the questions it agreed to

review had *assumed* "intentional discrimination." *See* Petition for Writ of Certiorari, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), at i. The basis of the intent allegation in *Franklin*, moreover, was not *respondeat superior*, but specific accusations of knowing misconduct by school officials. *See* Brief *Amici Curiae* of the National Women's Law Center, *et al.*, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (characterizing the violation in *Franklin* as "intentional" because the "school district . . . knowingly tolerated repeated sexual assaults against [the plaintiff]"). The lower court accepted these allegations as true for purposes of its order dismissing the complaint. *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 619 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992).

The Court's Spending Clause precedent, therefore, leaves no room for Title IX liability when the administrators who made the contractual commitment necessary to receive federal funds had no notice of the discrimination that is alleged.[6] *A fortiori*, damage rules based purely on the operation of legal doctrines

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[6]Even if the Court extended the Spending Clause to encompass claims based on "constructive notice," *see* Brief for Petitioners ("Pet. Br.") at 36-38, the result in this case would be no different, since the trial court expressly found that the evidence is "not sufficient to establish a genuine issue of material fact as to [Respondent's] actual *or constructive* notice of [the teacher's] sexually discriminatory conduct." Pet. App. at 9a (emphasis added). A remand to reconsider this determination would be inappropriate since review was not requested (and would not have been available) to consider the appropriateness of summary judgment or the existence of material factual disputes. *See* Petition for Writ of Certiorari at i (question presented); Sup. Ct. R. 10.

such as "vicarious liability," "actual or apparent authority," or similar rubrics -- applicable even when the program's administrators have not themselves engaged in any intentional *or* unintentional misconduct -- are inappropriate. Such doctrines are at odds with Title IX's limited purpose, presumed under *Pennhurst* and demonstrated by the legislative history, of requiring federal fund recipients to comply with circumscribed contractual commitments.

II. NOTHING PECULIAR TO TITLE IX OVERCOMES THE STRONG PRESUMPTION AGAINST SWEEPING SPENDING CLAUSE REMEDIES

Notwithstanding the caution counseled by this Court's Spending Clause precedent, the youth and vulnerability of Title IX harassment victims may create a temptation to fashion harsher remedies. *See* Pet. Br. at 19-24. Nothing would be accomplished, however, by a damage rule that penalizes school administrators who have acted responsibly when harassment cases have been brought to their attention, including many cases when the administrators had no opportunity to address or prevent unanticipated misconduct. A vicarious liability award against a school administration that reacted reasonably and responsibly to situations the knew about will not change future behavior; it will only divert education funds intended for the benefit of all students.

There is no justification, therefore, for a Title IX rule that would sweep more broadly than is necessary to deter inappropriate conduct. While Petitioners and supporting *amici* at times invoke distinctions between Title IX and Title VII that allegedly require a harsher Title IX rule -- even as they rely extensively on Title

VII case law -- none of these distinctions should sway the Court's analysis.

A. Differences Between The Texts Of Title IX And Title VII Are Not Controlling

As an initial matter, Title IX's operative text is phrased as a grant of freedom from discrimination given to individual "person[s]" instead of a prohibition against discrimination by specified parties. *See* Pet. Br. at 15-17; U.S. Br. at 21-22. Divorced from the balance of the statutory text, this language could mean "that all discrimination by anyone associated with the educational program, including students, violates the school district's duty and gives rise to liability under the statute." Pet. Br. at 18. This interpretation is rejected even by Petitioners. *Id.*

While some limitation obviously is required, *id.*, it need not be provided through a new judicially-created rule divorced from the statutory language. Title IX defines "education program" not to encompass "anyone associated with the educational program," *id.*, but rather to include only individuals involved in an institution's or district's "operations." 20 U.S.C. § 1687; *see Smith*, 128 F.3d at 1024 (definition restricted to administrative officials). Thus, if these individuals -- the program's administrative officers or board members -- have knowingly engaged in unlawful discrimination, then liability is appropriate. In the absence of such facts, however, the text of Title IX provides no basis for a damage award against the program in question.

B. Department of Education Guidelines Do Not Require a Different Result

Nor should this Court be driven to a result contrary to its own precedent, as well as Title IX's text, legislative history, and purpose, because of deference to recent guidelines issued by the Department of Education's Office of Civil Rights ("OCR"). While these guidelines seem to suggest a role for broader employer liability notions such as "apparent authority," they are ambiguous as to the scope of the proposed rule or how it would apply. *See* 62 Fed. Reg. 12034, 12039 (Mar. 13, 1997). The new guidelines, moreover, represent a substantial shift in the OCR's position that does not merit controlling deference. *See Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 436 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Before the OCR issued its March 1997 guidelines -- after the events that led to this lawsuit as well as the trial court's ruling -- the only available expression of agency policy was a 1981 internal departmental memorandum. *See* U.S. Br., Lodging 2.[7] This memorandum is anything but clear, consisting mainly

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[7]A non-public document, drafted by agency counsel with no policymaking authority, is not a statement of official agency interpretation that is binding on educational institutions that had no access to it. *See, e.g., Smiley v. Citibank, N.A.*, 116 S. Ct. 1730, 1734 (1996) (opinion expressed in letter from Deputy Chief Counsel for the Comptroller of the Currency insufficient to establish "binding agency policy").

of a rambling discourse on individual cases. While the memorandum includes a few scattered references to agency principles in the context of student-on-student harassment, *see, e.g., id.* at 7, it concludes that several critical issues concerning the liability of educational institutions, including the effect of harassment prevention measures on *respondeat superior* liability, remain "unresolved." *Id.* at 8-10.

Moreover, even if assorted references in that document to EEOC guidelines and Title VII cases could somehow be construed as a wholesale adoption of "EEOC standards of employer liability," Pet. Br. at 39, the EEOC's own position has been anything but clear or consistent. As of 1981, the EEOC apparently interpreted Title VII, as it argued in *Meritor* five years later, to support employer liability for hostile environment harassment only if the employer knew or should have known about the situation but failed to respond reasonably. *See Meritor*, 477 U.S. at 71 (quoting Brief for the United States and EEOC as *Amici Curiae* ("EEOC Br., *Meritor*") at 26). The EEOC's interpretation changed, however, when the Commission issued revised policy guidance in 1990. EEOC Policy Guidance on Sexual Harassment (Mar. 19, 1990), *reprinted in* Fair Empl. Practices Manual (BNA) 405:6681.[8]

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[8]The EEOC's 1990 Policy Guidance began with the principle that employers should be subject to "direct liability" if they "knew or had reason to know of the sexual misconduct" of a supervisor, *Id.* at 405:6695 (citing EEOC Br., *Meritor* at 25). The Guidance adds, however, that "imputed liability" might also be found because harassment was within a supervisor's "scope of employment" or "apparent authority, or under "other similar theories." *Id.* at 405:6696-

[Footnote continued on next page]

If the OCR's vague 1981 internal memorandum is somehow read as documenting the agency's intention to interpret Title IX in lockstep with the EEOC, including all future changes in the Commission's position, then OCR policy has been no more consistent than the EEOC's shifting articulations. If, on the other hand, the early statement is interpreted as adopting the EEOC's position as of 1981, then OCR policy would not have supported liability in this case until 1997, when the agency suddenly changed course.

In either event, neither the OCR guidelines nor the EEOC interpretations they reference offer a coherent or consistent position, and this Court should not depend upon them for conclusive authority. Instead, the Court should rely on Title IX's text, legislative history, and underlying purpose to hold that education programs cannot be liable for sexual harassment claims when their administrators knew nothing about the misconduct that is alleged.

[Footnote continued from previous page]

99. These latter declarations directly contradict the Commission's brief in *Meritor*. *See* EEOC Br., *Meritor* at 24 ("By definition," a supervisor is "not exercising . . . actual or apparent authority" or "further[ing] any business of his employer as principal" in a hostile environment case).

CONCLUSION

For all of the foregoing reasons, the Court should affirm the decision of the court below.

February 13, 1998

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(10)

No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER, AND
ALIDA JEAN MCCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE KENTUCKY SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES

BRIEF OF THE KENTUCKY SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief amicus curiae is filed by the Kentucky School Boards Association with the written consent of the parties pursuant to Supreme Court Rule 37.[1]

INTEREST OF AMICUS CURIAE

The Kentucky School Boards Association ["KSBA"] is a non-profit corporation of school boards from each public school district in Kentucky. The KSBA was founded in 1936 and serves school board members and school districts in such areas as governmental relations, board member development, risk management, legal services, policy services and publications, and community relations. With nine hundred school board members, the KSBA is the largest organization of elected officials in Kentucky. As educational institutions receiving federal financial assistance, the public school districts in Kentucky are subject to the provisions of Title IX. As a result, any decision by the Court regarding school district liability under Title IX will have a direct impact on them.

[1] No counsel for a party authored this brief in whole or in part. The Kentucky School Boards Insurance Trust and Coregis Insurance Company have made a monetary contribution to the preparation and submission of the brief.

SUMMARY OF ARGUMENT

The issue presented in this case is what standard of liability should be utilized in determining when a school district should be held responsible under Title IX for an employee's sexual harassment of a student. Title IX was enacted pursuant to the Spending Clause. As such, only an intentional Title IX violation can result in liability for a monetary award. Additionally, the language of Title IX mandates that only the actions of a school district are relevant in determining whether an intentional violation has occurred. The conduct of a school district's agents alone is insufficient to impose liability. Based on the origin and unique language of Title IX, the appropriate liability standard is one of actual knowledge. A school district should be liable for the sexual harassment of a student by an employee only when a school administrator who has supervisory authority knows of the harassment or a substantial risk of the harassment and fails to act.

ARGUMENT

In *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the Fifth Circuit held that Title IX liability attaches only when a school official with the authority to supervise and intervene receives actual knowledge of a teacher's sexual harassment of a student and thereafter fails to act.[2] The Seventh Circuit adopted

[2] The Fifth Circuit reaffirmed its position in the case on appeal. *Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1226 (5th Cir. 1997).

the same liability standard in *Smith v. Metropolitan School District*, 128 F.3d 1014 (7th Cir. 1997). The petitioners urge the Court to reject the actual notice standard articulated in *Rosa H.* and *Smith* and to adopt what amounts to a strict liability standard. Because the Fifth and Seventh Circuits are correct in their analysis of Title IX, the Court should acknowledge the appropriateness of the actual notice standard and reject the other standards suggested by the petitioners.

I. No Clear Standard of Title IX Liability Has Yet Been Established.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court recognized that monetary damages are available for Title IX violations. However, the Court did not reach the issue of the standard of liability to be imposed on school districts when such violations are caused by their employees. In fact, while lower courts have generally assumed that sexual harassment of a student by a teacher is sufficient to create a cause of action under Title IX, *Franklin* did not so hold. In *Franklin*, the school board conceded this issue, and as a result, the Court focused on the remedies available and not on whether a cause of action had been presented. *Franklin*, 503 U.S. at 65-66; *see Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1400 n.14 (11th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843). Since the *Franklin* decision, a number of divergent liability theories have emerged. These theories include: (1) the application of agency principles contained in the

RESTATEMENT (SECOND) OF AGENCY;[3] (2) actual knowledge by the school district of the harassment; (3) the imposition of Title VII principles; and (4) strict liability.[4]

While many courts have adopted Title VII principles to analyze Title IX claims, they acknowledge that the Court has not sanctioned this approach. *See, e.g., Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 749 (E.D. Va. 1995) (adopting a Title VII approach even though Supreme Court has not addressed the appropriateness of this strategy). Their primary rationale for applying a Title VII analysis is the lack of case law under Title IX and the convenient abundance of authority under Title VII. As

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[3] Most courts applying this standard rely on RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) which is a two-tort approach. Both the intentional tort of the employee and the negligence of the school district must be demonstrated before school district liability will attach. *See, e.g., Nelson v. Almont Community Sch.*, 931 F. Supp. 1345, 1355 (E.D. Mich. 1996) (essentially a two-tort negligent or reckless conduct standard). However, the Second Circuit and the Department of Education, Office for Civil Rights ["OCR"] advocate a far more sweeping standard pursuant to § 219(2)(d). Under this standard, a school district is liable for a teacher's sexual harassment of a student if the teacher was aided in carrying out the harassment by his or her position of authority. *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); Department of Education, Office for Civil Rights, *Sexual Harassment Guidance ["Guidance"]*, 62 Fed. Reg. 12034, 12039 (1997). The petitioners obviously support the later approach, which can be interpreted broadly to impose strict liability.

[4] While this standard has been adopted by a small minority of federal district courts, it has been rejected by the circuit courts. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

stated in *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996):

> Because Title VII sexual harassment and sexual discrimination principles have been so well litigated, while Title IX has a short historical parentage, courts have and do resort to Title VII standards to resolve sexual harassment claims brought under Title IX.

Id. at 514; *Brown v. Hot, Sexy & Safer Prod., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1044 (1996) ("Because the relevant case law under Title IX is relatively sparse, we apply Title VII by analogy.").

Missing from the equation is any analysis of the language or history of Title IX. Because Title IX is separate and distinct from Title VII in both its content and lineage, the majority of courts have too quickly rushed to embrace Title VII concepts without proper foundation. The Fifth and Seventh Circuits have recognized this inherent flaw and have developed a standard which more appropriately reflects the intent of Congress in enacting Title IX.

II. Actual Notice and Failure to Act Is the Appropriate Standard of Liability.

A. The language and origin of Title IX.

Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or

> activity receiving Federal financial assistance. . . .

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). "Program" or "activity" is defined to include all of the operations of a local educational agency, system of vocational education, or other school system. 20 U.S.C. § 1687(2)(B). The congressionally imposed penalty for the violation of Title IX by an education program or activity is "the termination of or refusal to grant or to continue assistance under such program or activity." 20 U.S.C. § 1682.

In *Franklin*, the Court touched on but did not decide whether Title IX was enacted pursuant to the Spending Clause[5] or section 5 of the Fourteenth Amendment.[6] *Franklin*, 503 U.S. at 75. However, strong precedent supports the conclusion that Title IX was legislated solely under the Spending Clause. In *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), the Court described the nature of Spending Clause legislation:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. Unlike legislation enacted under § 5, however, legislation enacted pursuant to the

[5] The Spending Clause provides that "Congress shall have the Power To . . . provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1.

[6] Section 5 of the Fourteenth Amendment provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

> spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.

Id. at 17 (citations omitted). Title IX comports with this characterization. Congress expects compliance with Title IX in exchange for the continued receipt of financial assistance. *Davis*, 120 F.3d at 1397-98 (legislative history evidences congressional intent to impose non-discrimination requirement on basis of sex pursuant to Spending Clause).

The similarities between Title IX and Title VI further support the fact that Title IX was enacted pursuant to the Spending Clause. Except for the identified class of protected persons, the language of Title VI is identical to Title IX.[7] Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. While not reaching the issue regarding Title IX, six Justices have determined that Title VI, after which Title IX is modeled, was enacted pursuant to the Spending Clause. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598 (1983) (While, J.); *id.* at 636-37 (Stevens, J., dissenting).

[7] In *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), the Court recognized that "Title IX was patterned after Title VI. . . ."

The same must logically be true of Title IX, and this result impacts the appropriate standard of liability.

B. Liability cannot be imposed under Title IX without the existence of intentional discrimination.

In *Franklin*, the plaintiff student alleged that she had been sexually harassed by one of her teachers and further contended that school administrators had *actual* knowledge of the harassment but took no action. *Franklin*, 503 U.S. at 64-65. Under such circumstances, the Court had no difficulty determining that the plaintiff had stated a cause of action for which monetary damages were available. *Id.* at 74-75. However, in reaching this conclusion, the Court discussed the importance of distinguishing between intentional and unintentional statutory violations when legislation has been promulgated under the Spending Clause. The Court stated:

> In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28-29, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981), the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. . . . The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *See id.*, at 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged.

Id.[8]

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[8] The Court's reference in *Pennhurst* is to the following language: "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981).

Because an intentional violation by the institution is required to impose a monetary remedy under Title IX, the Court must reject a standard of liability based on the agency principles contained in the RESTATEMENT (SECOND) OF AGENCY. Section 219 provides:

> WHEN A MASTER IS LIABLE FOR THE TORTS OF HIS SERVANTS
>
> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or speak on behalf of the principal and there was reliance upon the apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

Liability cannot be imposed under § 219(1) because an employee's sexual harassment of a student is never considered within the scope of employment of any reputable business. *Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 563 (1997); *Smith*, 128 F.3d at 1029, n.17. Recognizing this truism, plaintiffs most frequently rely on § 219(2)(b), which requires that

the employer act with negligence or recklessness. *See Stilley v. University of Pittsburg*, 968 F. Supp. 252, 267 (W.D. Pa. 1996). However, negligence or recklessness does not equate to an intentional act.

While a teacher sexually harassing a student no doubt acts with intent, the Spending Clause does not permit this intent to be imputed to a school district which had no knowledge of the harassment. Under Title IX, it is the program or activity which must act with intent, not the teacher, in order for liability to attach. The Seventh Circuit recognized this principle in *Smith:*

> While Smith [the plaintiff] contends that imputing a teacher's intent to the school district limits institutional liability to intentional actions, this argument improperly shifts the focus from the "program or activity," which must have acted intentionally, to the teacher, who in abusing a child clearly acts intentionally, including his intent to keep his unwarranted conduct secret. "We do not agree that a plaintiff can evade Title IX's intent requirement so easily." The appropriate question still must be whether the "program or activity" acted with intent, because as held above, only a grant recipient – a recipient of grant funds to run a "program or activity" – can violate Title IX. Thus, it must be the grant recipient – an institution or agency having administrative control over the school – that discriminates against the plaintiff.

Smith, 128 F.2d at 1028 (quoting *Rosa H.*, 106 F.3d at 652). Because § 219(2)(b) does not require that the school district act intentionally, this standard has no place in any Title IX analysis.

Title VII principles are also based on agency law and are likewise inapplicable. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) ("Congress wanted courts to look to agency principles for guidance in this area."). Under Title VII, employers are strictly liable for quid pro quo harassment and are liable for hostile work environment harassment if they knew or should have known of the harassment and failed to take appropriate remedial action. *Stilley*, 968 F. Supp. at 266. Quid pro quo strict liability requires no knowledge or intent on the part of the school district. Identical to § 219(2)(b) of the RESTATEMENT, the Title VII "should have known" standard is based on negligence. *Smith*, 128 F.3d at 1028-29 (citing *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990)). Thus, neither the Title VII strict liability standard nor the "should have known" standard demands the intent required by the Spending Clause. *Id.; Rosa H.*, 106 F.3d at 655-56. For this reason, Title VII principles must be rejected in favor of an actual knowledge standard which will give meaning to the limitations imposed by the Spending Clause.

C. The language of Title IX limits intentional violations to the actions of the funding recipient.

In addition to the restrictions created by the Spending Clause, the language of Title IX evidences that Congress did not intend for school districts to be vicariously liable for the acts of their agents under principles of agency law. Title IX prohibits discrimination "under any education program or activity" receiving federal funds. "Program or activity" is defined to mean the operations

of "a local educational agency." 20 U.S.C. § 1687. Agents are not included in this definition. Moreover, the Title IX regulations define "recipient" to mean "any public or private agency, institution, or organization . . . to whom Federal financial assistance is extended . . . and which operates an education program activity which receives or benefits from such assistance. . . . " 34 C.F.R. § 106.2(h). Again, agents of such an entity are not mentioned.

As both the Fifth and Seventh Circuits recognized in *Rosa H.* and *Smith,* the omission of agents from the definition of "education program or activity" is significant. In *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986), the Court discussed the appropriate standard of liability for hostile work environment sexual harassment under Title VII. While declining to issue a definitive rule, the Court concluded that "Congress wanted courts to look to agency principles for guidance in this area." *Id.* at 72. This determination was based on the fact that Congress specifically elected under Title VII to define "employer" broadly to include "any agent." 42 U.S.C. § 2000e(b). Embracing the Court's reasoning in *Meritor,* lower courts adopted the "knew or should have known" standard in analyzing hostile work environment cases. *Rosa H.,* 106 F.3d at 654; *Smith,* 128 F.3d at 1023-24.

The rationale upon which the Court relied in approving the application of agency principles in Title VII actions is not present under Title IX. Title IX does not define recipients broadly to include the agents of those recipients. Thus, the conduct which must be scrutinized under Title IX is that of the school district. The language of Title IX does not permit the extension of this inquiry to

the acts of employees who have no administrative control, such as teachers. Vicarious liability simply has no place in the Title IX analysis.

D. Title IX requires the actual notice of a school administrator who has the authority to act before liability can attach.

Because Title IX requires intentional discrimination and because intent cannot be imputed to the school district under any theory of vicarious liability, the school district itself must know of the harassment or of a substantial risk of the harassment and fail to act before it will be liable. In examining the meaning of actual knowledge under this standard, the Fifth Circuit likened this type of notice to the deliberate indifference concept under § 1983.

These cases construing the test for deliberate indifference are helpful because they highlight the distinction between an intentional wrong and a wrong that flows from mere neglect. As we have explained, Title IX liability depends on a school district's act of discriminating on the basis of sex. Just as a prison official has not punished an inmate unless he actually knows of a danger to the inmate and chooses not to alleviate the danger, a school district has not sexually harassed a student unless it knows of a danger of harassment and chooses not to alleviate that danger. Although drawn from a different body of law, *Farmer* and *Hare* clarify the indispensable role that deliberate action plays when liability stems from intentional conduct such as punishing or discriminating.

Rosa H., 106 F.3d at 659 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (en banc)).

In *Rosa H.*, the Fifth Circuit further considered who in the school district could receive actual notice sufficient to constitute notice to the school district. The court devised a middle ground between two extreme positions: (1) only school board members and (2) any school employee other than the harasser. *Id.* at 659-60. The Fifth Circuit concluded that the actual knowledge of any school official who has supervisory authority over the harasser and has the power to act to end the harassment is equivalent to the actual knowledge of the school district. Thus, if this official fails to act after receiving actual notice, the school district can be legally responsible for the inaction under Title IX. The Seventh Circuit adopted the same standard in *Smith*, 128 F.3d at 1034.

The Fifth and Seventh Circuits have articulated the appropriate standard for imposing Title IX liability on school districts. This standard recognizes that students have the right to be free from sexual harassment by teachers and at the same time, assures school districts that they will not be held responsible for conduct about which they had no knowledge and no opportunity to cure. Any less stringent liability standard imposes a financial risk which Congress did not intend[9] and which

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[9] Unlike Title VII, Title IX has no liability limits. The Civil Rights Act of 1991 was passed a year before the *Franklin* decision, recognizing that monetary damages were available under Title IX, and does not apply to Title IX. 42 U.S.C. § 1981a.

school districts cannot absorb. Contrary to the petitioners' assertion, school districts are not the absolute insurers of student safety. *Doe*, 103 F.3d at 510 (no constitutional duty to protect students). Under Title IX, they should only be liable for those acts over which they have the ability to exercise control.

III. The Strict Liability Standards Suggested by the Petitioners Are Not Appropriate.

The petitioners urge the Court to adopt one of two strict liability approaches in analyzing Title IX claims. The petitioners first suggest that a school district should be automatically liable for the sexual harassment of a student if it has failed to adopt and disseminate grievance procedures for Title IX complaints. This approach imposes school district liability regardless of whether the student would have utilized the grievance procedures if they existed. As an alternative, the petitioners argue that school district liability should attach if the teacher was aided by his or her position in carrying out the harassment. Because both approaches are inconsistent with the intentional discrimination requirement of Title IX and are in fact more stringent than Title VII agency principles, they must be rejected.

A. The absence of grievance procedures should not invoke automatic liability.

The Title IX regulations require that school districts adopt and publish grievance procedures for the resolution of student and employee complaints pertaining to

discrimination on the basis of sex.[10] 34 C.F.R. § 106.8(b). The petitioners reason that liability should be absolute if a school district is not in compliance with this requirement at the time the sexual harassment of a student occurs. The Department of Education, Office for Civil Rights ["OCR"], concurs with this position. Department of Education, Office for Civil Rights, *Sexual Harassment Guidance ["Guidance"]*, 62 Fed. Reg. 12034, 12040 (1997).[11]

The approach which the petitioners advocate is inconsistent with the intentional discrimination requirement mandated by the Spending Clause. The failure of a school district to adopt grievance procedures is not a discriminatory act in and of itself. *Does v. Covington County Sch. Bd.*, 969 F. Supp. 1264, 1274 (M.D. Ala. 1997) ("An institution's failure to comply with a procedural regulation, such as the failure to promulgate a grievance procedure, is not an action which discriminates on the basis of sex."). Moreover, the lack of such procedures constitutes "negligence at best." *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1420 (N.D. Iowa 1996). As previously discussed, negligence is insufficient to create Title IX liability because of the restrictions imposed by the Spending Clause.

While the petitioners rely on *Meritor* in support of their argument that strict liability should attach absent

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[10] While the Title IX regulations are quite extensive, at no point do they mention sexual harassment or provide any guidance in this difficult area.

[11] Guidelines issued by an administrative agency may provide guidance to the courts but are not controlling. *Meritor*, 477 U.S. at 65.

grievance procedures, *Meritor* did not so hold. In *Meritor*, the employer argued that it should be insulated from liability because it had a policy and grievance procedure against harassment. While the Court found this evidence to be relevant, the Court did not consider it dispositive. *Meritor*, 477 U.S. at 72. Additionally, even though the EEOC argued that an employer without an adequate policy should be automatically liable for the sexual harassment of an employee, the Court declined to adopt this or any other rule. *Id.* at 71-72. Thus, even should the Court endorse the application of Title VII agency principles in Title IX cases, liability should not attach simply because the school district has not adopted grievance procedures. Just as the existence of such procedures was not sufficient in *Meritor* to insulate the employer from liability, the lack of such procedures should not render liability absolute.

B. Pure agency principles create strict liability and should not be adopted.

The OCR acknowledges that sexual harassment of a student can occur despite the "best efforts" of school personnel. *Guidance*, 62 Fed. Reg. at 12034. Despite this recognition, the OCR has adopted sweeping agency standards which virtually assure that school districts will be liable any time an employee sexually harasses a student. The petitioners also endorse these standards.

According to the OCR, school districts will always be liable for quid pro quo harassment, which occurs when a school employee conditions a benefit (e.g., grades) upon the receipt of sexual favors. While this standard is consistent with Title VII agency principles, the OCR further

asserts that school districts will be strictly liable for an employee's hostile environment sexual harassment if the employee:

> (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school whether or not the employee acted with authority); or
>
> (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution.

Id. at 12039. Only in those rare situations in which these standards are inapplicable does the school district's response to the harassment have any relevancy.[12]

Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997), illustrates the far-reaching implications of the OCR's position. In *Kracunas*, two students complained that a college professor made inappropriate comments of a sexual nature to them but did not make any conditional threats or promises. In adopting a standard for the review of Title IX cases, the Second Circuit stated:

> Thus, we hold that if a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory

[12] The OCR is also of the opinion that school districts can be liable under Title IX for peer-to-peer sexual harassment. *Guidance*, 62 Fed. Reg. at 12039. The Fifth and Eleventh Circuits have soundly rejected this approach. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 165 (1996); *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-843).

> relationship to further the harassment of the student, the college is liable for the professor's conduct.

Id. at 88. This approach is obviously based on § 219(2)(d) of the RESTATEMENT.

The Second Circuit is the only court of appeals to adopt pure agency principles to resolve Title IX cases.[13] The fallacy in this approach is that it creates in practice a standard of strict liability.

> It is important to note that agency principles would create liability for school districts in virtually every case in which a teacher harasses, seduces, or sexually abuses a student. In addition to § 219(2)(b) of the *Restatement*, which makes a master liable when he acts negligently, courts could rely on § 219(2)(d), which creates liability whenever the servant is "aided in accomplishing the tort by the existence of the agency relationship." The teacher's status as a teacher often enables the teacher to abuse the student. Whether his power came from the aura of an instructor's authority, the trust that we encourage children to place in their teachers, or merely the opportunity that teachers have to spend time with children, John Contreras's [the teacher] chances of initiating a sexual relationship with an adolescent such as Deborah were enhanced when the school district hired him.

Rosa H., 106 F.3d at 655; *Smith*, 128 F.3d at 1029-30.

[13] Unlike other courts of appeal, the Second Circuit apparently also analyzes Title VII cases under pure agency principles. *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir. 1994).

While we assert that the appropriate liability standard in Title IX cases is actual knowledge, Congress surely did not intend for school districts to be strictly liable for the sexual harassment of students when it enacted Title IX. The eradication of discrimination based on sex is a noble goal. However, it is unreasonable to hold communities financially responsible for the criminal acts of a teacher through the state and local taxes they pay to fund local school systems. *Smith,* 128 F.3d at 1030-31. "Simply put, strict liability is not part of the Title IX contract." *Canutillo Indep. Sch. Dist. v. Leija,* 101 F.3d 393, 399 (5th Cir. 1996), *cert. denied,* ___ U.S. ___, 117 S. Ct. 2434 (1997). No justification exists for imposing liability simply because the school district employs the harasser. At the very minimum, some degree of fault must be present. As a result, the Court should reject the pure agency principles suggested by the petitioners.

CONCLUSION

For the reasons expressed herein, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 96-1866

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ALIDA STAR GEBSER AND ALIDA JEAN MCCULLOUGH,

Petitioners,

vs.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND NEW JERSEY SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a school district that receives federal funds can be held liable under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), for sexual abuse of a student by a teacher when the school district had neither actual nor constructive knowledge of that abuse.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

No. 96-1866

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INTEREST OF AMICI CURIAE

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards association, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin

Islands, and the Commonwealth of Puerto Rico.[1] Founded in 1940, NSBA represents the nation's 95,000 school board members who, in turn, govern 15,173 local school districts that serve more than 40 million public school students--approximately 90 percent of all elementary and secondary students in the nation. The New Jersey School Boards Association (NJSBA) is a statutory, nonprofit organization, comprised of approximately 600 boards of education in the State of New Jersey.

Amici strongly believe in the policy of non-discrimination behind Title IX of the Education Amendments of 1972. NSBA has had resolutions condemning discrimination for many years. The resolution adopted by NSBA's Delegate Assembly at its national convention in 1997 reads as follows:

> NSBA believes that all public school districts should adopt and distribute policies stating that racial and sexual harassment against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective grievance mechanism.
>
> Districts should institute in-service programs to train teachers and administrators to recognize sexual and racial harassment against employees and students and to investigate complaints. Education programs for students should also be instituted to eliminate sexual and racial harassment by students and peers.

[1] The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the amicus curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici agree with the decisions and analysis of the Fifth, Seventh, and Eleventh circuit courts of appeals and urge this Court to adopt the standard expressed in those cases. A liability standard that requires actual knowledge by school administrators is protective of student rights and is consistent with Title IX's history, language, and purpose. The proposals advanced by the Petitioners are contrary to the plain meaning and purpose of Title IX and will not reduce the risk of sexual harassment in the schools.

Moreover, the Petitioners' proposals would have a devastating financial impact on the nation's public schools, a consequence that would disserve all students. Jury verdicts in teacher/student abuse cases often reach into the millions. Although abuse of minors is reprehensible, Congress did not intend to jeopardize school district funds in the absence of institutional wrongdoing.

The Petitioners erroneously describe the Office of Civil Rights Sexual Harassment Guidance as articulating the longstanding position of the Department of Education. The 1997 Guidance was recently adopted in the course of other litigation, should not be applied retroactively, and should not form the legal basis for the availability of Title IX damages. The 1997 Guidance should not be used to override the legal analysis from Fifth, Seventh and Eleventh circuit courts.

This Court should reject the Petitioners' request to apply Title VII standards to Title IX. The numerous differences between Title VII and Title IX preclude wholesale application of Title VII jurisprudence to Title IX cases. Title IX is a

Spending Clause statute. Only intentional acts of the federal grant recipient should trigger Title IX liability. Theories of agency liability and detailed procedural requirements are critical to Title VII liability. No such provisions are found in Title IX.

Title IX should not be used to impose an affirmative duty to ensure that harassment will not occur. This standard ignores the secretive nature of sexual abuse, exceeds the scope of Title IX, and creates unrealistic guarantees.

If the Court were to adopt the Petitioners' proposals, the Court in effect would be amending Title IX, not merely interpreting it. As this Court observed in one of its original Title IX opinions, "policy considerations" are "for Congress to weigh, and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice."[2] Here, the legislative choice of Congress prevents open-ended damages claims that are based on the illegal acts of rogue school employees.

ARGUMENT

I. Liability without fault is contrary to congressional intent and would be financially devastating for the nation's public schools.

If the public schools are subjected to vicarious liability as desired by the Petitioners, then many schools will face damages verdicts that actually exceed their annual federal funding. For example, in 1995-96, Lago Vista ISD, with a student population of 656, received just $126,385 in federal

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[2] *North Haven Board of Education v. Bell*, 456 U.S. 512, 535, n.26 (1982).

aid.[3] That figure is miniscule compared to the $1.4 million dollar verdict in one recent Title IX case.[4] Most school districts could not weather the storm of such a verdict. For example, while Texas has 1,043 school districts, 820 of them have less than 1,600 students and have correspondingly small budgets.[5]

When a school accepts federal aid, it "weighs the benefits and burdens before accepting the funds." *Guardians Association v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 596 (1983). If one of the "burdens" of accepting the funds is to guarantee that no teacher will ever abuse a student, many school districts will simply reject federal money and attempt to make up the difference with an increase in local property taxes or other revenues sources. Surely Congress did not intend to *discourage* schools from accepting federal aid. *Cf. id.* 603 n. 24 (the "salutary deterrent effect of a compensatory remedy" may be "outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs").

Even the existence of insurance does not assuage the impact of Petitioners' broad proposals. Many insurance companies have imposed huge premiums for coverage of incidents involving sexual abuse of minors or, worse, they have refused to cover this type of claim, forcing school districts to self-insure. *See Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695 (5th Cir. 1996); *see also John R. v.*

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[3] Texas Education Agency, Division of Performance Reporting, *Snapshot '96: 1995-96 School District Profiles*, p. 314-318 [hereinafter Texas Education Agency].

[4] *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996).

[5] Texas Education Agency, *Snapshot '96*, at 5.

Oakland Unified Sch. Dist., 769 P.2d 948, 956 (Calif. 1989) (vicarious liability for sexual torts would make insurance "even harder to obtain, and could lead to the diversion of needed funds from the classroom").

Although sexual harassment of students is repugnant, schools cannot afford to perform the role of insurer, particularly with respect to incidents that occur off campus and under a cloak of secrecy. School funds must be reserved for the education of children. Congress did not intend to jeopardize school district funds in the absence of institutional wrongdoing. When large damages verdicts are awarded against a school district, "everyone but a random plaintiff loses." *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947 (W.D. Tex. 1994), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

II. The Office for Civil Right's Sexual Harassment Guidance deserves no deference. The Guidance was created for purposes of litigation, 25 years after passage of Title IX. Moreover, OCR expertise is irrelevant to the question of when damages are available.

Contrary to the briefs of the Petitioners and the United States, the Department of Education has not had a "longstanding" position concerning liability for sexual harassment in the primary and secondary schools. The Sexual Harassment Guidance issued in March 1997 by the Office for Civil Rights represents a new statement of position by OCR. *See* Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12039 (1997) [hereinafter 1997 Guidance]. While agency interpretations of a statute are entitled to deference if they are "longstanding," *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n. 11 (1982),

where the agency's position has not been demonstrably consistent over time or is unclear, then the interpretation is not owed any deference. *See id.* at 522 n. 11 and 538 n. 29.

Until the issuance of the 1997 Guidance, neither the Department of Education nor its Office for Civil Rights had published any policy statements on sexual harassment in the primary and secondary schools. The Department of Education's Title IX regulations were and are completely silent on the subject of sexual harassment. *See* 34 C.F.R. §§ 106.01-106.61 (1995). In contrast, the regulations provide explicit detail concerning the administration of athletics, admissions policies, housing, and the like. *Id.*

Perhaps reflecting Title IX's origin as a statute to end discrimination in higher education, OCR's original focus was the *university* setting. Two classic examples are documents cited by the Petitioners: a 1981 internal memo by OCR on harassment in higher education and a 1984 pamphlet concerning harassment of university students. *See* OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)[6]; "Sexual Harassment: It's Not Academic" (OCR pamphlet, August 1984). For whatever reason, OCR did not recognize sexual harassment as a concern in the public schools and did not attempt to provide any guidance or instruction to the nation's public schools.

As recently as November 1993, the OCR was still telling public schools that it had yet to develop a policy guidance addressing the unique environment of the public

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[6] The Petitioners' Brief states that the 1981 memo "declared" that the Title VII standards will apply to Title IX claims. Although the memo summarizes the Title VII standard, Section IV of the memo indicates that an "unresolved issue" is the applicability of various Title VII concepts.

schools. *See* Appendix A, Letter of Stacey Roseberry, Attorney Advisor, Elementary and Secondary Education Policy Division, Office for Civil Rights (Nov. 12, 1993).

The 1981 and 1984 documents are unhelpful in answering the Question Presented for yet another reason. Although both documents refer to institutional "liability" or "responsibility," they clearly are not references to an institution's liability for *money damages* because such damages did not exist under Title VII until 1991,[7] and they did not exist under Title IX until *Franklin v. Gwinnett County Public Schools* was decided in 1992.[8] Indeed, during this Court's consideration of *Franklin*, the United States filed an amicus brief *opposing* money damages for Title IX claims. Rather than represent a "longstanding" position, the 1997 Guidance represents a new statement of position concerning the availability of damages and the circumstances under which those damages might become available.

OCR's jurisdiction is to provide guidance on what acts constitute discrimination and what affirmative steps schools should take to prevent and investigate claims. OCR expertise is irrelevant to the question of whether damages are available under Title IX, "a function clearly within the purview of judicial competence." *Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066, 1075 (2nd Cir. 1984). The usual factors supporting deference--including contemporaneous adoption with the statute, agency expertise, and formality--are missing in this instance. *See generally Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1033-34 (7th Cir. 1997)(the 1997 Sexual

[7] Damages first became available with the passage of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

[8] 503 U.S. 60 (1992).

Harassment Guidance is neither a regulation nor an interpretation of a regulation); *see also Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (listing deference factors); *Batteron v. Francis*, 432 U.S. 416, 425 n. 9 (1977) (timing of the agency's position is a factor as is the expertise of the agency over the subject matter); *Board of Education v. Harris*, 622 F.2d 599 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981) (declining to defer to agency position that did not involve agency's expertise); *Capitano*, 732 F.2d at 1075 (rejecting interpretation because it was not contemporaneous with statute).

Finally, the 1997 Guidance deserves no deference because it appears that it was written for purposes of litigation. Although it purports to be an information tool for non-lawyer school employees, the 1997 Guidance, with its extensive lawyerly footnotes, represents OCR's articulation of its litigation posture. The first draft of the Guidance was published on August 14, 1996--just in time for inclusion in an amicus brief filed that week by the United States in support of the petition for writ of certiorari in another Title IX case, *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996).[9] The agency refused public comment on the substance of the draft Guidance. 61 Fed. Reg. 42728 (Aug. 14, 1996). The agency's apparent rush to create the Guidance in time for filing with this Court in *Rowinsky*, combined with the agency's refusal to take public comment, undercuts any deference argument. See, e.g., *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (agency's interpretations for purposes of litigation deserve no deference).

Even if the 1997 Guidance were valid, its new liability standards should not be applied retroactively. *Smith*, 128 F.3d at 1014; *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d

[9] *See* Brief of United States in No. 96-4, p. 2 & 11 (August 1996).

648, 658 (5th Cir. 1997) (Department of Education "cannot modify past agreements with [federal grant] recipients by unilaterally issuing guidelines through the Department of Education"); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 1497 (1994) (conduct ordinarily should be assessed under the law that existed when the conduct took place). The 1997 Guidance fails to provide a clear statement of retroactive intent, and Title IX itself contains no language authorizing the Department of Education to promulgate retroactive rules. *See* 20 U.S.C. § 1682. A general grant of rulemaking authority does not constitute authority to promulgate retroactive rules. *See Wright v. Director, Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1572 (11th Cir. 1990); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 213 (1988) (agency's power is limited to the authority delegated by Congress).

III. Under Title IX, only the acts of the federal grant recipient may trigger liability. Title IX's language and purpose preclude damages for sexual abuse by teachers unless the recipient's administrators knew about the abuse and failed to take corrective action.

A. *Substantial differences between Title IX and Title VII strongly counsel against adoption of the Title VII liability scheme.*

The Petitioners argue that the liability standard under Title IX should be the same or even broader than the liability standards under Title VII of the Civil Rights Act of 1964.[10]

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[10] 42 U.S.C. § 2000e (1994). Title VII permits employer liability based on agency or *respondeat superior* principles. 29 C.F.R. § 1604.11

While both Title IX and Title VII share a common prohibition against "sexual discrimination,"[11] the courts "must not fail to give effect to the differences between them." *North Haven*, 456 U.S. 512, 530 (1982). Analysis of the two statutes reveals those differences, which strongly counsels against adoption of Title VII liability standards in Title IX harassment cases.

Although several courts of appeals have adopted Title VII liability standards for Title IX cases, the analysis in these cases generally is limited and conclusory, with the courts turning to Title VII because it was convenient and not because Title IX itself demanded this result.[12] Other courts have recognized that it is improper to "blandly blur the distinctions" between Title VII and Title IX,[13] with three courts of appeals expressly rejecting the Title VII analogy proposed by the

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(1985); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986).

[11] Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). Title VII makes it unlawful "for an employer...to discriminate against any individual with respect to his...conditions...of employment" because of the person's sex. 42 U.S.C. § 2000e-2(a)(1) (1994).

[12] *See, e.g., Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2nd Cir. 1995); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996). One of the cases cited by the Petitioners--*Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 899 (1st Cir. 1988)--used a Title VII analogy, but the case did not involve any request for monetary damages. 864 F.2d at 884.

[13] *Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 145 (W.D. Pa. 1989) (refusing to "to transfer wholesale the EEOC guidelines into an area for which they were not drafted"), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989).

Petitioners.[14]

A major difference between Title IX and Title VII is that Title IX is Spending Clause legislation and its damages action is implied.[15] The Spending Clause enables Congress to place conditions on the receipt of federal dollars by grant recipients. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The legitimacy of the spending power is the recipient's *voluntary* and *knowing* acceptance of the conditions attached to the money. *Id.* Congress must articulate the conditions "unambiguously." *Id.* Vicarious liability for employee sexual harassment has never been an "unambiguous" part of the Title IX contract. *See Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996) (schools were not given notice); *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1030 (7th Cir. 1997) (same). Unlike Title VII's guidelines,[16] Title IX's regulations are completely silent on sexual harassment and the standard of liability.[17] The first reported case involving sexual harassment in the primary or secondary schools did not even appear until 1990 with the Eleventh Circuit decision in *Franklin v. Gwinnett County Public Schools*,[18] which rejected

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[14] *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014 (7th Cir. 1997); *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 (11th Cir. Jan. 20, 1998).

[15] Amici acknowledge that the Court has not expressly ruled on this point. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 n. 8 (1992).

[16] 29 C.F.R. § 1604.11 (1985).

[17] 34 C.F.R. § 106.01-106.61 (1995).

[18] 911 F.2d 617 (11th Cir. 1990), *rev'd*, 503 U.S. 60 (1992).

liability for damages. It defies reality to suggest that school districts in the 1980s or 1990s understood that they would be held vicariouly liable in damages for sexual misconduct by teachers.

B. *The Title VII liability standard is tempered by several employer-protective provisions--including a cap on damages--which indicate general congressional reluctance to open the door to large damages claims in discrimination cases. It is unfathomable to believe that Congress wanted to expose non-profit public schools to huge judgments, while protecting large for-profit corporations.*

Although the Title VII standard of liability permits employer liability even in the absence of actual knowledge, the Title VII standard is tempered by statutory provisions that protect employers from large judgments and stale claims. These include a cap on damages, a short statute of limitations, and a mandatory exhaustion-of-remedies provision that keeps many disputes out of court.

First, Title VII contains limitations on the damages that are recoverable. Damages were not even available under Title VII until 1991 when Congress enacted Section 1981a, which permits limited damages based on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3) (1994). Title IX is notably missing from Section 1981a, which suggests that, "in 1991, Congress did not view Title IX as the kind of legislation that could generate expansive liability." *Rosa H.*, 106 F.3d at 68 n. 4. If Lago Vista ISD, an employer of less than 101 people,[19]

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[19] Texas Education Agency, *supra* note 3, p. 316.

were sued under Title VII by an employee, its maximum potential damages under Section 1981a would be *$50,000. See* 42 U.S.C. § 1981a(b)(3)(A). This damages figure is in sharp contrast to the $1.4 million dollar Title IX verdict in *Canutillo*. It is unfathomable to believe that Congress wanted to expose non-profit public schools to huge judgments, while protecting large for-profit corporations. Even after *Franklin*, Congress has not acted to add Title IX to the list in Section 1981a.

Second, unlike Title VII, which contains a statute of limitations of less than one year,[20] Title IX has no statute of limitations. Federal courts must turn to the personal injury statute of limitations of the state where the case is filed.[21] In Texas, the statute of limitations for minors is tolled until age 20, unless the case involves sexual abuse, in which case the statute is tolled until age 23.[22] A student who is molested in elementary school thus may wait until she is in college to file suit, compounding the difficulty of both prosecution and defense.

Third, Title VII claimants must exhaust administrative remedies before filing suit. 42 U.S.C. § 2000e-5(b). This allows conciliation or elimination of many disputes without litigation.

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[20] 42 U.S.C. § 2000e-5.

[21] *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74 (3rd Cir. 1989); *Egerdahl v. Hibbing Community College*, 72 F.3d 615 (8th Cir. 1995); *see generally Wilson v. Garcia*, 471 U.S. 261 (1985) (if a federal statute does not have a limitations provision, court will borrow analogous state law).

[22] Tex. Civ. Prac. & Rem. Code §§ 16.001 & 16.0045 (West Supp. 1998).

C. *Under Title VII, the culpable party is the "employer" and its "agents." Under Title IX, the only culpable party is the federal grant recipient, which is defined as the entity that has been given legal authority by the state for "administrative control" of school services.*

Title VII defines "employer" to include the employer's "agents." 42 U.S.C. § 2000e(b); *see generally Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 72 (1986) (although common-law agency principles are not transferable "in all their particulars," courts should look to common-law agency principles for liability determination). In contrast, Title IX does not instruct courts to impose liability based on anything other than the acts of the recipient of the federal funds. *See* 20 U.S.C. § 1681; *Rosa H.*, 106 F.3d at 654. Under Title IX, only "institutional misconduct is the basis for institutional liability." *Floyd*, 1998 WL 17093, at 2.

The statute and regulations firmly support this conclusion. Title IX states that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving federal financial assistance*." 20 U.S.C. § 1681(a) (emphasis added). A "program or activity" refers to the "operations" of the "local educational agency." 20 U.S.C. § 1687. The phrase "local educational agency," in turn, is defined according to 20 U.S.C. § 8801.[23] Section 8801(18) defines "local educational agency" as a "public board of education" or other "public authority" the entity that has been

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[23] Title VI also defines "program or activity" as the "operations" of a local educational agency as defined in section 8801 of Title 20. *See* 42 U.S.C. § 2000d-4a(B).

given legal authority *by the state* for "administrative control or direction of" school services. *See also* 34 C.F.R. § 106.2(h) (1989) (defining "recipient" as any state or local political subdivision).[24]

As in municipal liability cases under 42 U.S.C. § 1983, in which the identity of the municipal tortfeasor is a question of state law,[25] state law determines the identity of the Title IX recipient. *See Smith*, 128 F.3d at 1020; *Floyd*, 1998 WL 17093, at 3. Courts must determine which individuals possess lawful administrative control of the programs and activities of the school system. In Texas, for example, the board of trustees controls the operation of the school system and is the only entity that can receive money on behalf of the district. *See* Tex. Educ. Code §§ 11.002, 11.151, 11.152 (West 1996). The board of trustees, however, may delegate authority to the superintendent and to campus principals with respect to certain defined tasks, such as supervision of personnel. *See* Tex. Educ. Code §§ 11.201, 11.202 (West 1996).

In short, the proper focus in a Title IX damages case is the conduct of the administration of the educational program. *See, e.g.*, Comments of Rep. Mink, 117 Cong. Rec. 39252 (1971) ("Any college or university which has [a] ... *policy* which discriminates against women applicants...is free to do so" but should not ask the taxpayers to support it) (emphasis added). This Court's Title IX and Title VI cases have addressed institutional or administrative policies or practices of

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[24] In light of these narrow definitions of "recipient," courts have held that the only proper defendant under Title IX is the school district itself; individual employees may not be sued. *See Smith*, 128 F.3d at 1018-19; *Lipsett*, 864 F.2d at 884, 901.

[25] *See City of St. Louis v. Praprotnik*, 485 U.S. 130 (1988).

the grant recipient rather than isolated acts by employees. *See, e.g., Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582, 597 (1983) (White, J.) (questioning whether the grantee was aware that it was "*administering* the program in violation of the statute" and whether the plaintiff "has been intentionally discriminated against by the *administrators* of the program"); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (admissions policy case; Congress wanted to avoid supporting "discriminatory practices"); *Univ. of Calif. Regents v. Bakke*, 438 U.S. 265 (1978) (admissions policy); *see also Franklin*, 503 U.S. at 64 and n. 3 (school administrators discouraged student from pursuing discrimination charge under Title IX).

Consistent with Title IX's definitions of "program or activity" and "local educational agency," the Fifth and Seventh circuit courts of appeals have held that a school district will be responsible for abuse by an employee when a manager who "was invested by the school board with the duty to supervise the employee" learned about the abuse but failed to take action that would end the abuse despite having the authority to do so. *See Rosa H.*, 106 F.3d at 659. When administrators engage in intentional discrimination, only then the recipient can be said to have violated the terms of the Title IX contract, and institutional liability may flow from that breach. *See id.* (a federal grant recipient has not sexually harassed a student "unless it knows of a danger ... and chooses not to alleviate that danger").

This approach "locates the acts of subordinates to the board at a point where the board's liability and practical control are sufficiently close to reflect its intentional discrimination." *Id.* at 660. "When a school board confers on a school official the power to take such personnel actions, it makes a deliberate considered judgment about what sort of leadership the district

should have...." *Id.* at 660. Amici agree with this approach because it reflects how school boards actually operate and because it reflects the text and purpose of the statute. Title IX's plain language, coupled with its omission of an agency provision, shows that Congress did not intend to impose open-ended liability based on the conduct of employees in furtherance of their own personal and lurid aims. Limiting the scope of liability is particularly appropriate where the plaintiff is pursuing a private cause of action that has been "implied by the judiciary rather than expressly created by Congress."[26]

Rather than view the omission of an agency provision as an indicator that agency principles will not apply, the Petitioners argue that the omission must mean that Title IX provides for even broader liability than Title VII. In the absence of the word "agent," they posit, there are practically no limitations at all. Their argument ignores the plain language of the statute as described above. Moreover, "[i]f all that is required is that the discrimination occur under a covered program or activity, then there would be no need to adopt a standard for institutional liability--liability would be absolute." *Smith*, 128 F.3d at 1027 n. 15. "For obvious good reasons, Congress did not incorporate agency law in its mandate under Title IX. If Title VII did not include 'agents' in its definition of employer, the Supreme Court in *Meritor* would not have had a statutory basis for adopting agency principles... This obvious distinction between Title VII and Title IX cannot be rationalized into extinction in order to arrive at a conclusion Congress did not direct." *Smith,* 128 F.3d at 1026 n. 12.

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[26] *Guardians*, 463 U.S. at 597; *see also Franklin*, 503 U.S. at 78 (Scalia, J. concurring) (noting the irony in permitting the most expansive of remedies for a judicially created cause of action, "the most questionable of private rights").

When Congress has failed to provide a statutory basis for the application of agency principles, this Court in the past has refused to adopt a federal law incorporating common-law agency principles. *See, e.g., Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978) (municipality cannot be vicariously liable for the acts of its agents).

D. *There is no textual support for Petitioners' agency theory. Moreover, no teacher ever has "apparent authority" to rape a school child.*

This Court should reject the Petitioners' agency argument because there simply is no textual support for it. Moreover, the argument should be rejected because it misapplies traditional agency theory and because, in a school context, it makes absolutely no sense. Petitioners cite Section 219(2)(d) of the Restatement (Second) of Agency, which states that a master will be liable for the acts of the servant if the servant is "purporting to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship." The commentary to the Restatement shows that this provision applies only in the narrowest of circumstances. *Smith*, 128 F.3d at 1029 (citation omitted). The classic examples are the telegraph operator who sends false telegraph messages or a store manager who shortchanges customers. *Id. (*citing § 219, comment e). In these situations, "from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." *Id.* (citation omitted). In the case of sexual harassment, the "transaction" obviously is not regular on its face. In Miss Gebser's, for example, she testified that she knew that the

school district would end the relationship if it was discovered.[27]

Numerous state courts have refused to hold schools liable in teacher/student abuse cases.[28] In *John R. v. Oakland Unified Sch. Dist.*,[29] a case involving a coercive male teacher/male student sexual relationship, the California Supreme Court held that the school district could not be held liable on an agency theory, observing that a "more personal escapade less related to an employer's interests is difficult to imagine." The court in *John R.* rejected the argument that the teacher's abusive actions allegedly flowed from his exercise of job-created authority, concluding that any "connection" between the authority to teach and the occurrence of sexual abuse was too attenuated."[30] The court concluded that the historical policy justifications for vicarious liability fall apart

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[27] Miss Gebser's testimony defeats apparent authority for other reasons. Apparent authority is determined by the conduct of the principal toward the third party, not the agent's conduct toward the plaintiff. *See* Restatement (Second) of Agency § 8, Comment a (1958). Moreover, apparent authority exists only to the extent the third party reasonably believes that the agent is authorized to do the act. *Id.*, comment c.

[28] *See, e.g., John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948 (Calif. 1989) (rejecting vicarious liability in teacher/student abuse case); *Mary KK v. Jack LL*, 203 A.D.2d 840, 611 N.Y.S.2d 347 (1994) (rejecting vicarious liability in teacher/student abuse case); *Bratton v. Calkins*, 870 P.2d 981 (Wash. App. 1994) (rejecting vicarious liability in teacher/student abuse case); *Lourim v. Swensen*, 936 P.2d 1011 (App. Or. 1997) (rejecting vicarious liability in Boy Scout leader/scout abuse case); *Doe v. Village of St. Joseph*, 415 S.E.2d 56 (Ga.App.1992) (rejecting vicarious liability in boarding school abuse case).

[29] 769 P.2d 948 (Calif. 1989).

[30] *Id.*

when applied in a school context:

> 'The principal justification for the application of the doctrine of respondeat superior ... is the fact that the employer may spread the risk through insurance and carry the cost thereof as a part of his costs of doing business.' [citation omitted] .... 'The acts here differ from the normal range of risks for which costs can be spread and insurance sought ...'[31]

Schools are not for-profit "businesses" that can pass along "costs" to consumers.

In short, apparent authority has no place in this case. No public school teacher has *apparent authority* to commit statutory rape or other crimes against a child. Miss Gebser, the student in this case, testified that she knew that the school district would condemn the relationship if it knew about it. In the end, use of pure agency principles would be tantamount to imposition of strict liability, which would be financially devastating to schools and which, as previously shown, would be contrary to the language and purpose of Title IX.

E. The Court must not adopt a standard that would discourage teachers who legitimately mentor their students.

It bears stating the obvious: most teachers are not molesters and seducers. Frank Waldrop is a horrible exception, not the rule. The Court must be careful not to adopt a standard that would discourage the development of the nurturing teacher/student relationships that characterize our best schools.

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[31] *John R.*, 769 P.2d at 956.

Adults often speak of the teacher "who turned my life around" by giving personal attention. They speak of the teachers who counseled them during difficult adolescent times or spent hours after school in private tutoring to help them convert a B into an A--or an F into a C. They speak of coaches who gave victory parties in their homes. Even federal law speaks of mentors who work with a youth "on a 1-to-1 basis establishing a supportive relationship." 20 U.S.C. § 8801(19). While school administrators must diligently observe faculty and make appropriate inquiries about discriminatory or criminal behavior, they are not equipped to engage in psychoanalysis and police tactics. The Court must not adopt a standard that would induce program administrators to discourage teachers who legitimately mentor their students. *See John R.*, 769 P.2d at 956, 957 (vicarious liability would induce schools to impose rigorous controls on any interaction between teachers and students).

F. *Constructive knowledge is, at its core, is a negligence standard and, thus, cannot support a claim for damages.*

The Petitioners also propose a constructive knowledge standard. Under Title VII law, an employer is deemed to have notice of sexual harassment if a person in a management position knew or should have known of the harassment and failed to stop it.[32] This standard is grounded in negligence[33]

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[32] *See Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988). These cases demonstrate another flaw in Petitioners' argument that classroom teachers are analogous to supervisors under Title VII. Title VII makes employers liable for the acts of supervisors because supervisors are, in essence, the employer. However, given that the bulk of employees in most businesses are *not* supervisors, the pool of potential Title VII tortfeasors is relatively

and, therefore, may not support a claim for damages under Title IX, which requires proof of an intentional violation. *Smith*, 128 F.3d at 1029 (citations omitted); *Rosa H.*, 106 F.3d at 656 (Congress did not intend to burden public school districts with "open-ended negligence liability").

A major difficulty with the negligence theory is that it is usually impossible to detect the occurrence of sex misconduct by a teacher. If school districts are held liable for what a jury (with the benefit of hindsight) decides the school district "should have known," then school districts will be held liable, in damages, even though they lacked knowledge or any intent to discriminate on the basis of gender. In this case, for example, the teacher's use of a few crude comments, while offensive and inappropriate, was not an indicator that the teacher would engage in sexual intercourse with a student.[34] Moreover, in response to the complaint about the comments, the principal promptly arranged a parent/teacher conference, and he gave a warning to the teacher. No further complaints were received. Although the Petitioners (with the benefit of hindsight) now criticize the principal's response, there is no

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small. In a school, the *majority* of all employees are teachers. *See* Texas Education Agency, *supra*, note 3, p.18. Under Petitioners' proposal, the pool of potential Title IX tortfeasors would be enormous.

[33] *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990).

[34] No pre-employment screening would have prevented the employment of Frank Waldrop, who had no criminal history. Moreover, the chances are "slim"--around 5 percent--that any given child abuser will have a criminal record. *See* American Bar Association, Center on Children and the Law, Effective Screening of Child Care and Youth Service Workers p. 25 (1994).

suggestion whatsoever that the principal discriminated on the basis of gender, that he ignored any indicators that the teacher was engaging in sexual misconduct, or even that the principal had a practice of disregarding complaints of harassment. Indeed, the parent who complained testified that the principal was a "good principal" and that he took her allegations seriously. (Tully depo. p. 36, attached to Plaintiff's response to Defendant's motion for summary judgment.)

In *Rosa H.*, the Fifth Circuit held the plaintiff must show that an administrator knew that the teacher posed a "substantial risk" of sexual harassment but failed to respond to that risk. 106 F.3d at 659. The court determined that any lower standard would result in imposition of a negligence standard. The distinction is important because, to obtain money damages in a Title IX action, the plaintiff must show intentional discrimination, not negligence. *Franklin*, 503 U.S. at 74-76.

G. *Title IX imposes a duty not to discriminate; it does not impose an "affirmative duty" to "guarantee" that harassment will never occur, as argued by the Petitioners.*

The Petitioners assert that Title IX creates an "*affirmative* duty ... to *insure* a school environment free of discrimination."[35] Neither the language of Title IX nor *Franklin* requires schools to act as insurers or guarantors. *Franklin* does not impose a duty "to insure"; it states that schools have a "duty not to discriminate on the basis of sex..." *Franklin*, 503 U.S. at 75. The Petitioners' argument that

[35] Petitioners' Brief at 16. Petitioners also state that schools must "guarantee" no discrimination will occur. *Id.* at 17.

schools must guarantee "a *school environment* free of discrimination" also ignores the fact that the sexual abuse in this case did not occur at school--it occurred at the student's own home and in other off campus locations. Parents, not schools, are often in a much better position to have knowledge of their children's activities and to question them about where and how they are spending their time after school. In this case, for example, unbeknownst to school officials, the teacher regularly visited Miss Gebser at her home and transported her in his personal vehicle.

The Petitioners suggest that schools have a duty to direct their teachers not to have sex with students. It does not take a written school regulation for a teacher to know that he cannot beat, kill, or molest a student. Long before Title IX, Texas, like all states, criminalized indecency with a minor. *See* Tex. Penal Code § 21.11 (West 1994). Similarly, educators (like most professions) operate under a code of professional standards. Because of the state-mandated teacher code of ethics, Texas teachers have long known that they will lose their jobs and teaching certificates if they engage in inappropriate conduct with students. *See* Code of Ethics and Standard Practice for Texas Educators, 19 Tex. Admin. Code § 177.1 (West 1997). The code prohibits teachers from using "institutional or professional privileges" for personal advantage, requires them to comply with all state and federal laws, prohibits them from discriminating against students on the basis of gender, and requires them to protect students from conditions detrimental to their physical health and mental health. *Id.* A school district that hires a teacher may presume that the teacher will comply with the standards of the profession.

IV. Petitioners' Brief ignores the complexities of preventing sexual abuse of children.

The Petitioners' Brief suggests that their proposals will prevent harassment claims. Regrettably, no legislation can guarantee schools will be free of abuse and harassment. People who are attracted to minors are a "diverse and complex population for which no single profile exists."[36] Because of the unpredictability of human beings, even the most vigilant school district may find that one of its employees has crossed the line. Sexual abuse of children is a vastly different social problem than sexual harassment of adults, and the usual prevention methods will not always work. The liability standards proposed by the Petitioners must be rejected because they will not achieve the goal of abuse prevention and because they, at their core, are all variations of strict liability--a standard that is contrary to public policy and contrary to the plain language and purpose of Title IX. Rather than solve the harassment issue, Petitioners' liability standards merely will divert money away from those programs and efforts designed to help schools tackle this difficult issue.

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[36] American Bar Association, Center on Children and the Law, Effective Screening of Child Care and Youth Service Workers p. 77 (1994) [hereinafter "ABA Study"]. The study was the first major evaluation of school and child care employment screening practices and their effectiveness. The ABA study was prepared under a grant from the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice. *See also* Myers et al, "Expert Testimony in Child Sexual Abuse Litigation," 68 Neb. L. Rev. 1 (1989) (clinical research indicates that adults who sexually abuse children are a heterogeneous group with few shared characteristics).

Between 1985 and 1990, reported incidents of child abuse (including sexual abuse) increased 31 percent.[37] Most all these incidents occurred at home, with only 1 to 7 percent of all cases occurring in schools, day-care centers, and other out-of-home settings.[38] Congress and the State Legislatures have responded with a variety of measures, all of which have attendant costs. All 50 states, including the State of Texas, now have penal statutes that hold school personnel criminally liable if they fail to report suspected child abuse to law enforcement authorities.[39] The National Child Protection Act of 1993 improves the procedures for collecting and computerizing abuse data and for conducting criminal checks on people who work with children.[40] State legislatures have responded by developing child abuse and sexual offender registries[41] and by adopting legislation that makes it easier for schools to obtain criminal history information on applicants.[42]

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[37] ABA Study, p. 8.

[38] ABA Study, p. 8.

[39] *See, e.g.*, Tex. Family Code § 261.101 (West 1996).

[40] 42 U.S.C. § 5101-5119c (1997).

[41] ABA Study, appendix (listing statutes).

[42] *See, e.g.*, Tex. Educ. Code §§ 22.081-084 (West 1996) (mandating that the State Board for Educator Certification obtain criminal history information on all individuals seeking teaching certificates and authorizing school districts to pull the criminal history of applicants). Significantly, implementation of these procedures is not cost free. Every background check requires payment to the law enforcement agency conducting the check, and employees must be trained to review and interpret the criminal history checks. ABA Study, p. 29-32.

Publishers have developed and now offer comprehensive training materials to help school employees with the prevention and investigation of abuse and harassment allegations. Training seminars for school personnel are now widely available, which simply was not the case in the years prior to the *Franklin* decision. While school districts can and should budget for these programs and activities, it is entirely another matter to ask them to "budget" for a large damages claim based on employees' secretive acts of sexual misconduct.

The National School Boards Association and the New Jersey School Boards Association therefore urge the Court to adopt the standard proposed by the Fifth Circui for actions for damages. This standard does not, as argued by the Petitioners, encourage school officials to keep their heads in the sand. The school that fails to respond to concerns about harassment may be sued under Title IX, may be subjected to a time-consuming on-site investigation by the Office for Civil Rights, or may lose its federal funding. School board members may find themselves defeated in the next election. School administrators may be subjected to criminal penalties under state law for failing to report suspected child abuse. They may lose their jobs and their certificates. In many states, tort law also is a source of liability. In the end, the greatest incentive for professional educators to respond diligently to allegations of harassment and abuse is not legal but moral and pedagogical: people in the school business do not want children to suffer. They care about kids, and when they suspect harm, they will act.

CONCLUSION

The judgment of the court of appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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DATED: February 13, 1998

APPENDIX A

UNITED STATES DEPARTMENT OF EDUCATION
Washington, D.C. 20202

Nov. 12, 1993

Mr. Craig M. Atlas
Scolaro, Shulman, Cohen, Lawler, Burstein & Ferrara, P.C.
90 Presidential Plaza
Corner of Townsend and Harrison Streets
Syracuse, New York 13202

Dear Mr. Atlas:

It is my pleasure to respond to your letter asking for information about sexual harassment in elementary and secondary education. In your letter, you specifically asked if the U.S. Department of Education Office for Civil Rights (OCR), has any information about suggested sexual harassment policies. You also asked whether there were any reported cases (or other information) on the following two issues: student-to-student sexual harassment at the primary education level, and what limits a school district should impose regarding hugging or other touching of students by staff members.

To date, we have found the following Title IX cases on sexual harassment in elementary and secondary education: Gwinnett v. Franklin County Public Schools, 112 S.Ct. 1028 (1992); Patricia H. v. Berkeley Unified School District, -- F.Supp. --, 1993 WL 33510 (N.D. Cal.); and Doe v. Petaluma City School District, -- F.Supp. --, 1993 WL 359872 (N.D. Cal.).

I have enclosed the only existing OCR policy guidance on sexual harassment. Please note that this document was issued in 1981. While the procedural guidance is still good, the case law is outdated. This policy is currently under revision, and we are incorporating the issue of sexual harassment in elementary and secondary schools.

As for model sexual harassment policies for elementary and secondary schools, both the American Association of University Women (AAUW) and the National School Boards Association have sample policies. They may be contacted at the following addresses:

AAUW
Program and Policy Department
1111 16th Street, N.W.
Washington, D.C. 20036
(202) 785-7700

National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6722

We have not reviewed these policies, and we can not endorse them. However, they may be useful to your client. In addition, if either you or your client are trying to develop such a policy, you should also feel free to contact our regional technical assistance staff at the following address:

Ms. Paula D. Kuebler
Regional Civil Rights Director
Office for Civil Rights, Region II
U.S. Department of Education
26 Federal Plaza, 33rd Floor
Room 33-130, 02-1010
New York, New York 10278-0082

I hope this information is helpful to you.

Sincerely,

Stacey Roseberry
Attorney Advisor
Elementary and Secondary
Education Policy Division
Office for Civil Rights

Attachment
As stated

(12)

No. 96-1866

In The

Supreme Court of the United States

October Term, 1997

ALIDA STAR GEBSER and
ALIDA JEAN MCCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF *AMICI CURIAE* OF TASB LEGAL ASSISTANCE FUND

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICI*

Nearly 750 public school districts in Texas are members of the TASB Legal Assistance Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. The TASB Legal Assistance Fund is governed by three organizations: The Texas Association of School Boards (TASB), the Texas Association of School Administrators (TASA), and the Texas Council of School Attorneys (CSA). The Texas Association of School Boards (TASB) is a non-profit unincorporated association of the public school districts of the State of Texas. Approximately 1047 public school districts in the state, through their elected boards of trustees, have joined as members of TASB. The members of TASB are responsible for the governance of the public schools of Texas. *See* TEX. EDUC. CODE ANN. §§ 11.151(b), (d) (Vernon 1996). The Texas Association of School Administrators (TASA) represents the state's school superintendents and other administrators who are responsible for carrying out the education policies adopted by their local boards of trustees. The Texas Council of School Attorneys (CSA) is composed of attorneys who represent more than 90% of the public school districts of Texas.

The Arizona School Boards Association is a non-profit corporation, whose membership is composed of the governing boards of 217 of Arizona's 225 public school districts.

The Arkansas School Boards Association is a non-profit organization whose membership consists of all the 311 school districts in Arkansas.

The membership of the Idaho School Boards Association is responsible for the education of more than 95% of Idaho's public school children. The Association has 109 as members and serves 562 individual trustees.

The Indiana School Boards Association is a non-profit association consisting of all 290 reorganized public school boards in Indiana. Its purpose is to promote the efficient and effective administration and operation of the public school corporations in the state.

The New York State School Boards Association is a not-for-profit corporation whose statutory purpose is to devise "practical ways and means for obtaining greater economy and efficiency in the administration of public school district affairs and projects" on behalf of public school districts in New York.

118 of the 119 local boards of education in North Carolina belong to the North Carolina School Boards Association, which exists to serve these boards as they set the policies that govern the education of more than the one million students who attend the public schools in the state.

The Ohio School Boards Association is a non-profit organization created for the purpose of assisting Ohio boards of education in matters relating to the conduct and operation of the public schools of that state. Although membership is voluntary, 100% of the city, county, local, exempted village and joint vocational school districts throughout the state of Ohio are members of the Ohio School Boards Association.

The Oklahoma State School Boards Association, Inc. is a private 501(c)(3) nonprofit association whose membership consists of more than 98% of the boards of education of public school districts in the State of Oklahoma. The Association's membership is responsible for the education of more than 98% of the state's public school children.

The Tennessee School Boards Association is a not-for-profit organization whose mission is to assist Tennessee's school boards in effectively governing public school systems.

The Wyoming School Boards Association was formed to serve as a collective voice for school boards throughout the state and to provide local boards of education with the specialized information they need to operate Wyoming's public schools in the most efficient and effective way possible.

The TASB Legal Assistance Fund and the other associations listed above urge this Court to uphold the decision of the court below. While school districts continually strive to prevent sexual harassment and sexual abuse of their students, a standard of liability that would increase their exposure to litigation and liability would do little to eradicate the problem. In fact, the standard of liability Petitioners propose could impede school districts' ability to develop effective sexual harassment prevention programs by diminishing school district resources. The actual knowledge standard developed by the court below, on the other hand, ensures that victims of teacher-student sexual abuse are compensated if the abuse results from school district action, but denies such damages if the school district neither caused nor facilititated the abuse. This standard thus strikes a balance between efforts to prevent sexual harassment and the realistic constraints on school districts' ability to eliminate sexual harassment and abuse completely.

STATEMENT OF THE CASE

Amici incorporates by reference the statement of the case contained in Respondent's brief.

SUMMARY OF THE ARGUMENT

Title IX was enacted to deter sex discrimination by educational institutions. This Court has determined that sexual harassment is a form of sex discrimination and

that victims of sexual harassment by educational institutions may recover monetary damages under Title IX. While Petitioners would have this Court look at Title IX with blinders on, we suggest the Court consider the interaction of this statute's standard of liability with other laws. In particular, we encourage the court to consider Section 1983 and the case law developed under it, which addresses the circumstances under which governmental entities can be liable for the very same harm. An actual knowledge standard similar to the deliberate indifference concept in constitutional cases provides the most appropriate standard for analyzing teacher-student sexual harassment and sexual abuse claims brought under Title IX. Not only would it align constitutional jurisprudence with Title IX case law, thus allowing for consistent imposition of liability on governmental entities, it would also provide the best solution from a public policy standpoint: school districts would still have incentive to take preventive measures but would not face potentially crippling liability if those preventive measures fail. As much as public school officials deplore sexual abuse of students, there is no way for school districts to guarantee that sexual harassment or sexual abuse will never occur. Further, vicarious liability does little to promote preventive efforts. An actual knowledge standard, on the other hand, limits unwarranted liability while promoting preventive efforts.

ARGUMENT

I. Title IX liability should be imposed only when an educational institution has actual knowledge that a teacher is sexually harassing or sexually abusing a student.

A. Title IX, a Spending Clause statute, has a limited purpose and scope.

As this Court has recognized, Title IX was enacted to accomplish two objectives: (1) to avoid the use of federal

resources to support discriminatory practices; and (2) to protect individual citizens from those discriminatory practices. *Cannon v. University of Chicago*, 441 U.S. 677, 705, 99 S. Ct. 1946, 1961 (1979).[1] Accordingly, when a recipient of federal funds discriminates on the basis of sex, it violates Title IX. This Court has further determined that sexual harassment is a form of sex discrimination. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76, 112 S. Ct. 1028, 1037 (1992).[2] But while Title IX is an important piece of legislation, designed to provide nondiscriminatory opportunities in education, it was not designed as a "cure-all" for all types of discrimination. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1014 (5th Cir.), *cert. denied*, ___U.S.___, 117 S. Ct. 165 (1996). Nor could it have been intended, by Congress or this Court, to establish in Title IX, a spending statute, substantive rights greater than those protected by the Fourteenth Amendment to the U.S. Constitution. Petitioners propose a standard of liability, however, that would make Title IX much more protective than the Constitution.

B. *Franklin v. Gwinnett* did not articulate nor imply a standard of liability for actions brought under Title IX; it held only that an action for money damages exists for violations of Title IX.

In *Franklin v. Gwinnett*, this Court cited *Meritor Sav. Bank F.S.B. v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399 (1986), a case involving sexual harassment in the workplace and arising under Title VII. *Franklin*, 503 U.S. at 76,

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[1] While we do not agree with the result in *Cannon*, we do not challenge its validity here.

[2] This decision is cited for the purposes of argument only, for we are not convinced that sexual abuse is a form of discrimination based on sex.

112 S. Ct at 1037. Little could this Court have predicted that in citing *Meritor* for the limited proposition that sexual harassment is a form of sex discrimination, many lower courts would interpret this reference to mean that Title VII standards dictate the outcome of Title IX cases. *See, e.g., Brzonkala v. Virginia Polytechnic Inst.*, No. 96-1814, 1997 WL 7855239 (4th Cir. Dec. 23, 1997); *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 514 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Lipsett v. Univ. Of Puerto Rico*, 864 F.2d 881, 899-900 (1st Cir. 1988). This overly simplistic conclusion is not supported by the language of Title IX, Congressional intent, or public policy. What these courts have failed to understand is that this Court merely referenced Title VII in *Franklin v. Gwinnett* for the limited purpose of determining whether sexual harassment is the equivalent of sex discrimination. Three circuit courts of appeals have recognized as much and have declined to apply Title VII standards in Title IX teacher-student sexual abuse cases. *See, e.g., Floyd v. Waiters*, No. 94-8668, 1998 WL 17093 at *2 (11th Cir. Jan. 20, 1998) (adopting Fifth Circuit's rejection of various potential theories of liability, including Title VII); *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1034 (7th Cir. 1997); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 656-658 (5th Cir. 1997). In so holding, they have refused to impose institutional liability based on a single act of one of the entity's employees. Yet under Petitioners' proposed standard of liability, institutional liability would be premised not on the acts of the educational institution itself, but on a single, unauthorized act of one of its employees. This Court now has the opportunity to clarify the seemingly broad language of *Franklin v. Gwinnett* and ensure that Title IX cases are resolved in a manner consistent with legislative

intent, legislative history, and with this Court's consistent treatment of public educational institutions.

C. The standard for determining liability under Title IX should be comparable to the standard used for determining liability under Section 1983.

Although this Court has yet to address the issue, many circuit courts have recognized that sexual abuse of a student by a school teacher acting under color of state law violates that student's right to bodily integrity under the substantive due process clause and is therefore actionable under Section 1983. *See, e.g., Doe v. Claiborne*, 103 F.3d at 506; *P.B. v. Koch*, 96 F.3d 1298, 1302 (9th Cir. 1996); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452-454 (5th Cir. 1994) (en banc); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989). Students who suffer such violations, like the harm alleged in this case, should be required to pursue their cause of action under the standards similar to those articulated in Section 1983 jurisprudence.

1. The plain language of Title IX prohibits discrimination by "educational institutions"; it makes no mention of educational institutions' employees.

Title IX prohibits discrimination by educational institutions. Accordingly, "institutional misconduct is the basis for institutional liability." *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 at *4. Under Title IX, this "institution" is the "local educational agency," which is defined as "the public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools. . . . " 20 U.S.C.

§§ 1687(2)(B), 8801(18). The Eleventh Circuit Court of Appeals reasoned that this definition would not allow institutional liability to be premised on an employee's knowledge of sexual harassment; rather, it could be based only on knowledge by those authorized to act on behalf of the district. In the case before the Eleventh Circuit Court, state law indicated that the school board and the superintendent were authorized to take actions on behalf of the school district.[3] The fact that a person occupying a lower position in the district had notice of sexual harassment, the court concluded, would not impute liability to the district:

> We do not think that school districts, in reality, have actual knowledge – the knowledge to support potentially million-dollar liability for the school district – whenever, for example, a deputy assistant director of transportation (but no one higher-up) may know that a bus driver is harassing someone or the foreman (but no one higher-up) of the district's emergency plumbing crew has knowledge of misconduct, and these supervisors could fire (but do not) the harassers.

Floyd, 1998 WL 17093 at *8, n.9. The 11th Circuit thus recognized, as this Court should, that liability for Title IX violations must be based only on actions of the entity.

2. Like Title IX, Section 1983 requires action by the entity.

In order to establish government liability under Section 1983, a plaintiff must show that "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be

[3] In Texas, the school board "has the exclusive power and duty to govern and oversee the management of the public schools," TEX. EDUC. CODE ANN. § 11.151(b) (Vernon 1996); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241 (5th Cir. 1993).

said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dept. of Social Servs. of N.Y.*, 436 U.S. 658, 695, 98 S. Ct. 2018, 2037-2038 (1978). This approach ensures that liability is based on actions of the entity: "Locating a 'policy' ensures that a muncipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the muncipality." *Board of County Commissioners of Bryan County v. Brown*, ___U.S.___, 117 S. Ct. 1382, 1388 (1997) (*citing Monell*, 436 U.S. at 698, 98 S. Ct. at 2027). Additionally, institutional liability under Section 1983 may be based on the decision of someone with final policymaking authority. *Bryan County v. Brown*, ___U.S.___, 117 S. Ct. at 1389; *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241 (5th Cir. 1993). Liability for constitutional violations, therefore, is premised on actions of the governmental entity, not on actions of its employees. As Title IX has a similar focus on the institution, rather than employees, a similar standard should apply. If a similar standard were used in Title IX teacher-student sexual harassment cases, liability would be based, as the language of Title IX contemplates, on the actions of the "educational institution."

3. Actual knowledge is similar to deliberate indifference.

Under an actual knowledge standard, an educational institution would be found to discriminate on the basis of sex when it had actual knowledge that a school district employee was sexually harassing, abusing, or otherwise discriminating against a student and failed to take action to stop the offensive activity. Continuing with the Section 1983 analogy, "actual knowledge" is the substantial

equivalent of "deliberate indifference." Deliberate indifference can be established by showing that: (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) this failure caused a constitutional injury to the student. *Doe v. Taylor*, 15 F.3d at 454; *see also, Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 760 (5th Cir. 1993) (holding that the school board did not ignore or turn a blind eye to accusations that a teacher sexually abused students, when the school board investigated the alleged incidents and reassigned the teacher; the board may have been negligent, but as the board had virtually no proof that the teacher had touched a student in an inappropriate manner, the board had not acted with deliberate indifference); *see also, Jane Doe "A" v. Special School Dist.*, 901 F.2d 642, 645 (8th Cir. 1990). Accepting "actual knowledge" as similar to "deliberate indifference," a school district will be liable under Title IX when it consciously disregards or is deliberately indifferent to sexual harassment of students by school district employees. *Seamons v. Snow*, 84 F.3d 1226, 1235 (10th Cir. 1996); *Doe v. Taylor*, 15 F.3d at 453 (explaining that a governmental entity cannot supervise its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens). Deliberate indifference is relevant, the Fifth Circuit Court has explained, because it "highlight[s] the distinction between an intentional wrong and a wrong that flows from mere neglect." *Rosa H.*, 106 F.3d at 659 (*citing Farmer v. Brennan*, 511 U.S. 825, 843-844, 114 S. Ct. 1970,

1978-1980 (1994) for its definition of deliberate indifference). The same rationale applies with even greater force in the Title IX context, due to the statute's specific focus on the institution. "Actual knowledge" in Title IX actions will function just as the deliberate indifference standard has in Section 1983 actions. Such indifference, disregard, or actual knowledge can be established by showing that a school district knew of a danger of harassment and chose not to alleviate that danger. *Rosa H.*, 106 F.3d at 659.

In keeping with this Court's interpretation of deliberate indifference, the actual knowledge standard will not mean that a plaintiff will recover only when a school board takes official action or adopts a policy that clearly discriminates on the basis of sex. A governmental custom, practice, or policy can be informal, implicit, or based on the entity's failure to act in the face of obvious violations. *Rizzo v. Goode*, 423 U.S. 361, 371, 96 S. Ct. 598, 604 (1976). Nor would an actual knowledge standard mean that widespread abuses would have to be shown before finding liability. Under Petitioners' theory, however, a school district would be liable simply because it employed a tortfeasor – and nothing more. This Court has not allowed vicarious liability for constitutional violations. Certainly, it cannot intend for the same harm to be remedied through vicarious liability under Title IX, a Spending Clause statute. By its terms, Title IX reflects Congress's intent for educational institutions to be liable for their own illegal acts; however, Congress did not obligate educational institutions to control the unauthorized conduct of others. *See Bryan County*, ___U.S.___, 117 S. Ct. at 1388 (*citing Pembaur v. City of*

Cincinnati, 475 U.S. 469, 479, 106 S. Ct. 1292, 1298 (1986)).[4] The actual knowledge standard is preferable because it prevents plaintiffs from skirting the requirements of *Monell* and its progeny to recover monetary damages for harm that could be remedied through Section 1983. In addition, it prevents Title IX from becoming a federal law of *respondeat superior*.

a. An actual knowledge standard will not negate school districts' responsibility, nor will it encourage districts to ignore instances of sexual harassment and sexual abuse.

Petitioners suggest that an actual-knowledge standard would negate school districts' responsibility and encourage them to turn a blind eye toward sources of sexual abuse. Petitioners' brief at 34. This argument fails for two reasons. First, individual supervisory officials may be held personally liable for sexual abuse committed by their subordinates under Section 1983; thus, they have an intense personal interest in ensuring that they follow up on the slightest suspicion that a school district employee may be sexually abusing a student. *Doe v. Taylor*, 15 F.3d at 454; *see, also, Jane Doe "A" v. Special School Dist.*, 901 F.2d at 645. Second, the school district itself may be liable under both Title IX and Section 1983. *See, e.g., Doe v. Taylor*, 15 F.3d at 443 (recognizing that a governmental entity is liable under § 1983 if it supervises its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens); *Rosa H.*, 106 F.3d at 652-3 (articulating actual knowledge standard

[4] While this case interprets the language of Section 1983, it provides guidance here, since neither Section 1983 nor Title IX contain language that requires control of another.

for determining school district liability in Title IX teacher-student sexual harassment cases). Therefore, school districts will adopt policies and implement procedures requiring investigation of and responses to allegations of sexual harassment or sexual abuse.

b. Agency principles will not increase vigilance.

Petitioners and their *Amici* argue that the Office for Civil Rights' 1997 Guidance, which incorporates agency principles, is necessary to ensure school districts' vigilance. Brief of United States at 20; Petitioner's Brief at 36-38; U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12039 (1997). Their argument ignores the very real standards under which school districts and school officials already operate – the duty not to be deliberately indifferent to the constitutional rights of students to be free from sexual abuse by a teacher. *See, e.g., Seamons v. Snow*, 84 F.2d 1226, 1234 (10th Cir. 1996); *Doe v. Taylor*, 15 F.3d at 454. Just as the deliberate indifference standard encourages districts to protect against constitutional violations, the actual knowledge concept encourages prevention of Title IX violations.[5] Moreover, "school

[5] At least one court has interpreted the actual knowledge standard very broadly. *See Mary M. v. North Lawrence Community Sch. Corp.*, 131 F.3d 1220, 1225 (7th Cir. 1997) (holding that principal had actual knowledge of sexual harassment when he overheard a cafeteria employee and a student planning to miss school on the same day.) Such an interpretation hardly permits districts to turn a blind eye to potential sexual harassment or sexual abuse of a student by a teacher. But even under the definition of actual knowledge applied in *Mary M.*, Lago Vista ISD would not be liable for Frank Waldrop's sexual abuse of Gebser, for it had absolutely no hint such a relationship was occurring.

boards that adopt a head-in-the-sand policy would be foolish indeed, morality aside, because they would encounter liability under 42 U.S.C. § 1983." *Rosa H.*, 106 F.3d at 658. Petitioners' theory, on the other hand, would expose educational institutions to vicarious liability for all acts of their employees – a result this Court has been unwilling, thus far, to impose on governmental entities.

Given the legal incentive that already exists, in the form of the deliberate indifference and actual knowledge standards, to prevent sexual harassment and sexual abuse, Petitioners' proposal to apply Title VII and agency standards is unnecessary. Deliberate indifference, a standard that has been working to protect constitutional rights for years, already demands that school districts prevent sexual discrimination. Cases decided since the facts in this case arose have strengthened this incentive and will work to minimize future instances of similar injuries. *See, e.g., Doe v. Taylor*, 15 F.3d at 454 (articulating test for determining individual supervisory liability under Section 1983); *Rosa H.*, 106 F.3d at 658 (adopting actual knowledge standard in Title IX teacher-student sexual abuse cases); *Smith*, 128 F.3d at 1034 (adopting actual knowledge standard in Title IX teacher-student sexual abuse cases); *Floyd*, 1998 WL 17093, at *4 (adopting actual knowledge standard in Title IX teacher-student sexual abuse cases). Actual knowledge will adequately protect students from discrimination by encouraging school districts to take preventive measures: Title IX liability will be found if the school district actually knew of a substantial risk that students would be sexually harassed and failed to respond. *Rosa H.*, 106 F.3d at 659. School districts are already working to prevent sexual

abuse and sexual harassment that could lead to constitutional injury. In the process, they are preventing, to the extent possible, violations of Title IX.[6]

4. Applying agency or agency-like principles to Title IX actions would contravene Congressional intent and the principles this Court articulated in *Monell*.

a. The Title VII constructive notice standard should not be transferred to Title IX cases.

Despite Title IX's focus on the entity, rather than employees, Petitioners would have this Court articulate a standard of liability that is based on principles developed under Title VII and agency law. Title VII and Title IX have a common feature – both prohibit discrimination on the basis of sex – but the similarity ends there. Title VII was directed primarily at the private sector; Title IX on the other hand, applies primarily to public institutions, which, unlike private employers, must respect rights

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[6] At the time the events in question arose, school district liability for sexual harassment or sexual abuse under Title IX was a relatively undeveloped area of the law. Futhermore, only the Third Circuit, in *Stoneking*, 882 F.2d at 726, had recognized a cause of action for sexual abuse against students under Section 1983. Since that time, this area of the law has exploded, providing school districts with additional guidance and increasing awareness of sexual harassment as a systemic problem. *See, e.g., Doe v. Claiborne*, 106 F.3d at 506; *Abeyta v. Chama Valley Indep. Sch. Dist.*, 77 F.3d 1253, 1255 (10th Cir. 1996); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1995) (recognizing that an individual's substantive due process right to bodily integrity was much clearer in 1987 than the Title IX "right" allegedly violated); *Doe v. Taylor*, 15 F.3d at 454.

established by the United States Constitution.[7] Furthermore, the language of Title VII specifically mentions employees as agents, while Title IX contains no such references.[8] The absence of such language in Title IX indicates that Congress did not intend for employees to be part of the Title IX framework.[9] School districts should not, therefore, be held to a constructive notice standard under Title IX.

b. Applying pure agency principles to Title IX would create a federal law of *respondeat superior.*

This Court has consistently refused to apply *respondeat superior* in Section 1983 cases because neither the language of Section 1983 nor the legislative history reflect

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[7] We realize, of course, that Title IX applies to all types of educational institutions, but for the purposes of our discussion, we focus on public institutions.

[8] Title VII provides in part, that an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any *agent* of such a person. (emphasis added)." 42 U.S.C. § 2000e(b). Title IX contains no parallel language.

[9] In fact, Title VII standards would merely increase the confusion that already exists with respect to Title IX. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535 (11th Cir.), *cert. granted*, 118 S.Ct. 1530 (1997) (noting the differing approaches used in the circuits to determine liability for hostile environment sexual harassment cases under Title VII and citing cases); *see, also, Jansen v. Packaging Corporation of America*, 123 F.3d 490, 492-493 (7th Cir. 1997) (en banc), *cert. granted sub nom, Burlington Industries v. Ellerth*, No. 97-569, 66 U.S.L.W. 3490 (Jan. 23, 1998) (expressing its inability to forge a majority position with regard to evaluating an employer's liability for sexual harassment by a supervisory employee).

any intent to create a federal law of *respondeat superior*.[10] Similarly, neither the language nor the legislative history of Title IX support the application of agency principles. *Smith*, 128 F.3d at 1023-31; *Rosa H.*, 106 F.3d at 654-7. Moreover, Congress surely never intended for Title IX, enacted under the Spending Clause, to confer greater protection, by way of a lower standard of liability, than Section 1983, which provides a mechanism to redress rights established by the U.S. Constitution. Finally, to analyze Title IX violations under a standard lower than that applied in Section 1983 cases would allow plaintiffs to recover for similar harm while evading the requirements this Court set out in *Monell*. Applying an actual knowledge standard in Title IX teacher-student sexual abuse cases will properly resolve these actions by allowing for consistent treatment of governmental entities regardless of the legal theory used: *respondeat superior* will not apply in the case of alleged constitutional violations, nor will it apply to alleged violations of Title IX. The actual knowledge standard, therefore, would allow meritorious Title IX claims to be redressed without allowing evasion (and ultimately, erosion, at least in teacher-student sexual abuse cases) of the principles set forth in *Monell*.

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[10] While Petitioners and OCR may sidestep use of the term "*respondeat superior*," in effect that is the standard they are trying to impose – making the acts of teachers the responsibility of the school district. 62 Fed. Reg. at 12039.

5. School districts have no affirmative duty to prevent constitutional harm under the Fourteenth Amendment, nor should such a duty be read into Title IX.

Petitioners assert without citing legal authority that Title IX imposes a duty upon school districts to protect students from sexual abuse and ensure a school environment free of discrimination. Petitioner's Brief at 16, 23. In essence, the Office for Civil Rights (OCR) in its Policy Guidance has also tried to impose such a duty.[11] In support of this position, Petitioners cite *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986), an inapposite case regarding school districts' authority to limit students' free speech rights.[12] *Bethel* did not, contrary to Petitioners' inferences, create a duty to protect, nor should such a duty be read into Title IX. This Court has established that the state has a constitutional duty to protect citizens from harm only in very limited circumstances. *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998 (1989). The lower courts have been careful to rule within these well-established limits and have held that compulsory attendance laws do not create an affirmative duty to protect students while at school. *See, e.g., Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997) (en banc); *Seamons v. Snow*, 84 F.3d at 1236; *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *D.R. by L.R. v. Middle Bucks Area Vo.*

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[11] OCR's Policy Guidance does not carry the force of regulation.The Guidance states that its purpose is to provide information to educational institutions so that they are better able to identify, prevent, and address sexual harassment. 62 Fed. Reg. at 12039.

[12] The United States, as *amicus* for petitioners, makes essentially the same argument. Brief of United States at 23-24.

Tech. School, 972 F.3d 1364, 1368-73 (3d Cir. 1992) (en banc); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990). If no affirmative duty to protect against constitutional injury exists under the Fourteenth Amendment, should such a duty be inferred in Title IX? Neither the statutory language nor its legislative history support such a conclusion. Title IX confers a limited benefit: students will not be discriminated against on the basis of sex by educational institutions. Title IX does not, however, require that educational institutions guarantee an environment completely free of any acts of sexual harassment or abuse. Congress surely did not intend to require school districts to protect students from all instances of sexual discrimination when those occurrences are unauthorized, unsanctioned, and uncontrollable. If it had intended such broad coverage, the language of the statute would have reflected that intent.

6. A school district should not be liable for a teacher's sexually abusive acts simply because it has not complied with the nominal terms of the Title IX regulations.

Petitioners contend that a school district should be strictly liable for sexual harassment or sexual abuse if the district has not complied with Title IX's requirement to adopt a written policy. This approach is unsupported by sound legal reasoning, public policy rationale, or simple logic: "failure to adopt a Title IX grievance policy is not itself an act of discrimination based on sex." *Seamons v. Snow*, 84 F.3d at 1233; *see also, Faragher v. City of Boca Raton*, 111 F.3d at 1539, n.11 (finding that the City's failure to effectively disseminate sexual harassment policy was not the reason the City did not know about the harassment.) Furthermore, it is completely conceivable that a school district could fail to complete a "Title IX"

policy, yet still have some extremely effective practices for preventing sexual discrimination and sexual harassment. The absence of a Title IX policy, therefore, should result in liability only when the lack of such a policy manifests a deliberate or conscious choice by the school district to disregard sexual harassment of students by employees *and* the lack of a policy is causally connected to the alleged harm. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 391, 109 S. Ct. 1197, 1206 (1989). Just as having a policy that follows Title IX requirements to the letter will not insulate a school district from liability for money damages, failure to have such a policy should not, without more, automatically lead to money damages.

A school district's failure to adopt a Title IX policy may constitute a minor violation of one of the Department of Education's Title IX regulations. The remedy for such a minor infraction is found within the Department of Education's own regulations. *See*, 34 C.F.R. § 74.62 (describing enforcement procedures to be used when recipient fails to comply with terms and conditions of an award.) The suggestion that money damages should be the remedy for such noncompliance is unwarranted. Furthermore, if this standard of strict liability were adopted, Title IX would become one of the most protective statutes in our country – more protective than the U.S. Constitution, through section 1983, more protective than any other statute enacted under the Spending Clause, and surely more protective than Congress ever intended.

D. An actual knowledge standard of liability preserves the tradition of not awarding punitive damages against a governmental entity.

Typically, victims of sexual harassment do not suffer a loss of wealth; while they may suffer emotional or

psychological harm that deserves compensation, the primary purpose of damages in these cases is to punish the discriminator, not to compensate the individual. *Jansen*, 123 F.3d at 510 (noting that victims of sexual harassment generally do not suffer loss of wealth) (Manion, J. and Posner, C.J., concurring and dissenting). Under a negligence or vicarious liability standard, however, school districts and other educational institutions would be punished for the malicious acts of their employees. This result would contradict the courts' tradition of declining to impose punitive damages on governmental entities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260, 101 S. Ct. 2748, 2756 (1981). We recognize that Title IX damages are not purely punitive and so do not ask this Court to reverse its decision in *Franklin v. Gwinnett* and disallow monetary damages completely. We do, however, suggest that limiting monetary damages to cases in which educational institutions are shown to have actual knowledge, and thus in some way have taken part in the sexual harassment, will ensure that damages that are at least partially punitive in nature are awarded only when appropriate. The standards Petitioners suggest, on the other hand, would disregard the common law tradition of not awarding punitive damages against governmental entities; it would serve ultimately to punish only the taxpayers, who took no part in committing the sexual harassment. *City of Newport*, 453 U.S. at 267, 101 S. Ct. at 2759.

Of course, damages also serve a deterrent purpose. There is no reason to believe, however, that the increased number of damage awards that would inevitably result from a negligence or vicarious liability standard would allow school districts to better control misfeasance by their employees. As this Court has stated, "it is far from clear that municipal officials, including those at the

policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their muncipality." *City of Newport*, 453 U.S. at 268, 101 S. Ct. at 2760. The misconduct of teachers, therefore, will not be deterred simply because their employer faces possibly large monetary penalties. The real deterrent exists when individuals can be held liable for the acts of their subordinates, as would be the case under Section 1983. *See, e.g., Doe v. Taylor*, 15 F.3d at 454 (establishing test for assessing supervisory liability in teacher-student sexual abuse cases). Followed to its logical conclusion, this line of reasoning demands that damages be awarded against an educational institution only when the institution knowingly allows sexual harassment to occur. Actual knowledge, therefore, emerges as the most appropriate standard to apply in cases of teacher-student sexual harassment or sexual abuse brought under Title IX.

II. Petitioner's standard of liability would subject school districts to potentially devastating monetary damages.

A. The statute itself makes no mention of liability.

Because the Court determined in *Cannon*, 441 U.S. 677, 99 S. Ct. 1946, that Title IX is enforceable through an implied right of action, the statute "contains no whisper of liability," nor any mention of liability, for that matter. *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996). And since it makes no reference to liability, logically it contains no limits on the award of damages. While many courts have chosen to analogize Title VII and Title IX, as discussed earlier, this overly simplistic view is supported by neither the language of the statutes nor by any public policy rationale. Although applying Title VII

standards may seem initially attractive, when it comes to damages, there is an important factor that distinguishes Title VII from Title IX: Title VII limits the size of damage awards. Private employers, therefore, may be liable for discriminatory practices, but the extent of that liability is limited. Under Title IX, however, there is no such limitation. Just as there is no evidence in the statutory language that Congress intended to subject school districts to liability based on the unauthorized acts of employees, it is equally hard to believe that Congress intended to provide greater protection to private employers than to the nation's public school districts. To accept Petitioners' proposed standard of liability would subject school districts to potentially devastating damage awards. Witness the jury award of $1.4 million awarded against one school district at the district court level. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947, 955 (W.D.Tex. 1995), *rev'd*, 101 F.3d 393, 399 (5th Cir. 1996). In later reducing the jury award, the judge recognized that the strict liability he had imposed had the potential for "massive awards." In fact, he stated, "even rich districts would be strapped by a verdict of $1.4 million." *Id.* at 955. In that particular case, the already financially poor school district eventually prevailed on appeal, but the cost of litigating the case (not to mention fighting another legal battle with the insurance company over coverage for the costs of defending the case, *Canutillo Indep. Sch. Dist. v. National Union Fire Insurance Co.*, 99 F.3d 695 (5th Cir. 1996)) surely drained that school district's educational funds. Ultimately, our children and our taxpayers pay the price in the form of higher tax bills and fewer resources for public education. As one court has recognized: "[t]here is no sound policy reason to hold a school district financially accountable, through strict liability, for the criminal acts of its teachers. . . . As horrible a crime as child abuse is,

we do not live in a risk-free society; it contorts "public policy" to suggest that communities should be held financially responsible in this manner (strict liability) for such criminal acts of teachers." *Canutillo,* 101 F.3d at 399. School districts find sexual harassment and sexual abuse as reprehensible as do Petitioners. But the standard Petitioners propose, and the remedy they seek, will only harm students who will lose the full benefits of already limited educational budgets.

B. An actual knowledge standard would not discourage meritorious actions; however, it would help prevent the onslaught of claims that a lower standard would undoubtedly provoke.

Franklin v. Gwinnett spawned hundreds of lawsuits against school districts alleging sexual harassment and/or sexual abuse. In Texas alone, for example, and looking only to those cases that have been reported or otherwise brought to our attention, more than 20[13] court actions have been filed against school districts alleging violations of Title IX. **Marsh v. Dallas Indep. Sch. Dist.*,129 F.3d 612 (5th Cir. 1997) (unreported opinion); **Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412; **Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997); **Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); **Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393; **Bowles v. Floresville Indep. Sch. Dist.*, 84 F.3d 432 (5th Cir. 1996) (unreported opinion); **Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996);

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[13] This estimate does not include currently pending cases, nor does it include all unreported decisions or those that may have been settled or otherwise disposed of prior to final adjudication.

Doe v. Taylor, 15 F.3d 443 (5th Cir. 1994); *Piwonka v. Tidehaven*, 961 F. Supp. 169 (S.D. Tex. 1997); **Doe v. Bridgeport Indep. Sch. Dist.*, No. Civ. A. 3: 94-CV-1889D, 1997 WL 279142 (N.D. Tex. May 14, 1997) (unreported opinion); *Doe v. Bridgeport Indep. Sch. Dist.*, Civ. A. No. 3: 94-CV-1889D, 1996 WL 734949 (N.D. Tex. Dec. 11, 1996) (unreported opinion); *J.W. v. Bryan Indep. Sch. Dist.*, No. H-93-3790 (S.D. Tex. 1995) (unpublished order); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437 (S.D. Tex. 1994).[14] Multiplying the Texas estimate by the 50 states results in a conservative estimate of the number of cases brought under Title IX in the five years since *Gwinnett* was decided. Adopting the liberal standard advanced by Petitioners would do little to stop sexual harassment but would definitely encourage more lawsuits against school districts. These lawsuits, regardless of their merit, must be defended – an activity that not only consumes scarce school district dollars but also takes educators away from their educational duties. Public school students thus suffer twice – in the form of reduced funding for educational programs and in the form of less time with their valued educators. The threat of litigation is already very real; adopting a standard based on actual knowledge will ensure that school districts comply with Title IX but are not continually defending lawsuits. We respectfully request, therefore, that the Court narrow its holding in *Franklin* to require actual knowledge before monetary damages will be available.

By narrowing the scope of *Franklin* to allow money damages only when the district itself has actual knowledge of sexual discrimination, this Court will do a great service to this country's students, its school districts, and

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[14] *For brevity's sake, we cite only the most recent, appellate disposition of these cases.

its taxpayers. Furthermore, it will ensure that school districts themselves do not become insurers against sexual abuse: "Strict liability converts the school district from being the educator of children into their insurer as well. And, if it is their insurer, it is most arguable that its role as educator – needed now more than ever – will suffer, and suffer most greatly." *Canutillo*, 101 F.3d at 400. From a public policy perspective, therefore, vicarious liability would exact a substantial toll on the nation's public schools.

C. Despite their best efforts, school districts cannot guarantee that sexual abuse will not occur.

As some astute courts have recognized, despite the best efforts of school districts, there is no way to guarantee that sexual abuse will never occur.[15] And as Petitioners so aptly point out, sexual abuse is, by its very nature, illicit, hidden, difficult to detect. Often, both parties to a sexual relationship – the teacher and the student – vehemently deny any suggestion of such a relationship. School districts do screen and monitor their employees. School officials also regularly seek and receive training

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[15] In *Jansen v. Packaging Corporation of America*, 123 F.3d at 511, the en banc court struggled to define an employer's liability under Title VII for both quid pro quo and hostile environment harassment. In a concurring and dissenting opinion, Chief Judge Posner and Judge Manion pointed out that strict liability would not promote the goal of deterring sexual harassment, as it would require an employer to go to "extreme expense and greatly [curtail] the privacy of its employees, as by putting them under continuous video surveillance. . . . [A] law that requires the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits." Moreover, under a strict liability standard, employers might just rather pay the occasional judgment to incurring costs arising from attempts to prevent sexual harassment.

on addressing and preventing sexual harassment. But the inherent unpredictability of human nature makes it impossible to predict with perfect accuracy which employee might sexually harass a student.[16] Consequently, Petitioners' proposed standard of liability will do little more than increase the number of claims against school districts; it will not, on the other hand, enable school districts to prevent or eliminate sexual harassment by school district employees. In this case, Petitioners suggest that the school district could have prevented Gebser's harm, but they present no evidence that Frank Waldrop had any criminal background or other history that would have alerted Lago Vista ISD to the possibility that he would engage in sexual relations with a minor student. Petitioners suggest that Waldrop's "inappropriate comments" should have provided sufficient notice to the district, but what would they suggest the district should have done? The principal responded by questioning Waldrop about these comments and directed him to refrain from using such language in the future. Realistically, there was little more that could have been done at that time. Furthermore, it is often difficult to obtain

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[16] Although examining a Title VII cause of action, the 7th Circuit recently struggled with establishing a standard for employer liability and recognized that employers simply cannot eliminate sexual harassment entirely: "It is facile to suggest that employers are quite capable of monitoring a supervisor's actions affecting the work environment. Large companies have thousands of supervisory employees. Are they all to be put under video surveillance? Subjected to periodic lie-detector tests? Trailed on business trips by company spies?" *Jansen*, 123 F.3d at 513 (Manion, J. and Posner, C.J., concurring and dissenting). And by the way, who is watching the person watching the surveillance monitor?

complete and accurate histories of teachers' past performance.[17] Petitioners ignore the reality of operating a school district: teachers (such as the one involved in this case) are employees with contractual, statutory, and constitutional rights. In many situations, especially in ones similar to the present case, a school district's figurative hands are tied – with such a minor infraction, it has no basis for any permanent disciplinary action. Could a few "inappropriate comments," which did not even rise to the level of profanity, constitute the "good cause" necessary to terminate a contractual employee? Not before a Texas hearing examiner, and probably not anywhere else in the United States.

Despite the fact that some instances of sexual abuse may be impossible to discover before it is too late, school districts constantly battle all forms of sex discrimination. To that end, numerous trainings, seminars, and in-services are conducted every year in an attempt to help school districts recognize, address, and prevent sexual harassment. In fact, training in recognizing and preventing sexual harassment and sexual abuse is the most requested training topic in Texas school districts and is certainly a "required course" for school officials throughout the country. The concerned professionals who direct the nation's school districts do not need a higher standard of liability to heighten their awareness of and interest in eliminating sexual abuse and harassment.

Finally, it is important to emphasize that Petitioners' standard of liability would do little to increase protection of students from sexual harassment; it would only

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[17] In Texas, for example, evaluations of teacher performance are confidential. TEX. EDUC. CODE ANN. § 21.355 (Vernon 1996). Furthermore, the fear of defamation claims often inhibits past employers from providing accurate references.

increase the amount of financial rewards they would receive if victimized. An actual knowledge standard may, on the other hand, further attempts to minimize the occurrence of sexual harassment. A school district can act to stop harassment or abuse only after it is aware of the harassment or abuse: "[R]equiring knowledge by the school district . . . as a condition to recovery of damages will result in much quicker and greater protection not only to the person being abused and providing notice, or on whose behalf it is given, but will also better protect or otherwise benefit those who may then be undergoing abuse from that, or another teacher." *Canutillo*, 101 F.3d at 399. School districts do their best, and will keep doing their best, no matter the standard of liability. A standard like Petitioners propose will do little to eliminate sexual discrimination in schools. In fact, it would only exacerbate the financial difficulties already facing school districts across the nation. The cost of defending Title IX lawsuits would easily exceed the funding Congress sought to provide educational institutions by enacting Title IX in the first place. If strict liability or constructive notice were the rule, would school districts really have any incentive to try to prevent sexual harassment? In a moral sense, yes, they would continue to persevere. But in the legal sense, even their best efforts would not reduce their exposure to liability.

CONCLUSION

Petitioners are looking at Title IX in a vacumn. It is not the only means of preventing sexual harassment, nor is it the only means of obtaining a remedy for sexual harassment. In addition to state laws, the Constitution protects schoolchildren's right to be free from sexual abuse by a schoolteacher. And while standards for imposing constitutional liability are higher than the standard

Petitioners seek to impose, a standard at least as high as that used to assess constitutional liability would ensure that governmental entities, such as school districts, will not be subject to devastating damage awards for unauthorized, unknown acts of their employees. If increasing the number of damage awards would help increase school districts' ability to prevent sexual harassment or would provide some meaningful incentive to fortify prevention efforts, then perhaps such a measure would be warranted. But unfortunately, despite school officials' best efforts, sexual harassment and abuse will continue to occur, to some extent, no matter what steps are taken – such is the nature of the human condition. Requiring actual knowledge ensures that it is the acts of the educational institution, not the unauthorized acts of its employees, that result in liability. Not only is the actual knowledge standard supported by the language of Title IX, it is also supported by public policy and would align school district liability under Title IX with the standard for liability under Section 1983 for the very same harm.

Respectfully submitted,

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